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No. 10-____

IN THE
Supreme Court of the United States

REX SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

SUSAN HAYS*
GEISLER HAYS, LLP
2911 TURTLE CREEK BLVD.
SUITE 940
DALLAS, TEXAS 75219
(214) 367-6040
shays@ghlawllp.com
**Counsel of Record*

DAVID SCHENCK
ANDREW WIRMANI
JONES DAY
2727 NORTH HARWOOD ST.
DALLAS, TEXAS 75201
(214) 969-5124
dschenck@jonesday.com
aowirmani@jonesday.com

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2050
DALLAS, TEXAS 75201
(214) 270-1400
etomko@cttlegal.com
jross@cttlegal.com

COUNSEL FOR PETITIONER

QUESTIONS PRESENTED

1) Whether this Court's decision last Term in *Yeager v. United States* was so inconsequential as to raise no "colorable question" as to the correctness of the Fifth Circuit's decision it reversed or to provide no "basis to conclude that" it "created an intervening change or 'correction' in the applicable law"?

2) As the Fifth Circuit held in conflict with decisions of the Tenth Circuit and this Court, whether an appeal from the denial of double jeopardy relief following a judgment of acquittal may be not "colorable" so as to destroy appellate jurisdiction, or whether appellate jurisdiction is a function of the category of order appealed?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Rex Shelby, Defendant-Appellant, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI

Rex Shelby respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 604 F.3d 881 and reprinted at App. 1a. The order of the United States District Court for the Southern District of Texas is not reported but is reprinted at App. 18a.

JURISDICTION

The judgment of the Fifth Circuit was entered on April 23, 2010. A petition for rehearing en banc was denied on May 17, 2010. App. 19a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Fifth Amendment provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

This case arises from the Fifth Circuit's refusal to recognize the effect of this Court's decision last Term in *United States v. Yeager*. Rex Shelby, Scott Yeager, and a third former Enron Broadband Services executive were tried and acquitted on multiple charges stemming from the allegation that they conspired to mislead the public about the

functionality of the company's software under development while they profited from the resultant inflation of the stock price. In Shelby's case, the jury acquitted him of all counts of insider trading in connection with a series of stock sales in June 2000. Given the record and points in actual controversy, the only rational explanation for the acquittals was that Shelby was not aware of and did not participate in any scheme to mislead the public. The jury failed to render a verdict on like counts as to sales from a few months earlier or to the conspiracy or securities fraud counts against him. When the Government obtained further indictments, proposing to retry the three men on related charges on which the same jury had failed to arrive at a verdict, all three sought issue preclusion relief under the Double Jeopardy Clause.

The Fifth Circuit concluded that Shelby and his co-defendants were obliged to show, as part of the determination of what the jury actually decided by its acquittals, why a rational jury would not have acquitted on the hung counts. Unsurprisingly, none of the Defendants were able to satisfy this standard, as any explanation for the actual verdict that would give rise to issue preclusion invariably conflicted with the jury's failure to answer the hung counts. The attempted reconciliation with the unanswered counts was most extreme in the case of Shelby's co-defendant, Scott Yeager. The Fifth Circuit was unable to arrive at any conceivable explanation, no matter how bizarre, for the jury's failure to acquit Yeager on the remaining charges. Nonetheless, applying its standard of presumed rationality underlying the failure to arrive at a verdict, the Fifth Circuit denied Yeager relief.

In Shelby's case, the Fifth Circuit's test yielded a highly improbable explanation for the unanswered counts in the face of the jury's acquittal: that the jury might have believed that Shelby was actively participating in a scheme to mislead the public about the existence or functionality of software under development in order to "pump up" the stock price in early 2000, but did not "use" that knowledge as "a factor" in his June 2000 sales of his shares netting him more than $5 million. Thus, the Fifth Circuit speculated that the jury might have viewed his "use" of the knowledge in connection with earlier trades as an explanation for its failure to acquit. *United States v. Yeager*, 521 F.3d 367, 373-73 (5th Cir. 2008). No one has plausibly argued or explained, before or after the verdict in this case, how someone allegedly participating in a scheme to commit a large and infamous public stock fraud, such as the Enron scandal, could act without "use" of his knowledge of that fact when he sells shares netting $5 million.

In November 2008, this Court granted certiorari as to Yeager and denied certiorari as to Shelby. Shelby's retrial was abated pending the Court's decision. On June 18, 2009, the Court reversed, rejecting the Fifth Circuit's issue preclusion test as "too burdensome" for defendants and making clear that (1) hung counts are a "nonevent" in the issue preclusion calculus, and (2) the determination of what the jury actually decided must be practically constrained and confined to "the points in controversy" from the original trial. *United States v. Yeager*, 129 S. Ct. 2360 (2009). This rule is applicable to all cases pending in the federal system and fully available to Shelby under any

understanding of the law of the case doctrine. Nevertheless, the district court denied Shelby relief, continuing to reason that this Court's decision in *Yeager* had not foreclosed speculation into the cause for the jury's failure to answer the remaining counts. App. 18a, 23-24a.

The district court acknowledged however that the motion to dismiss was not frivolous and issued a stay of any trial pending appeal. A motions panel of the Fifth Circuit held that Shelby's attempt to have the *Yeager* standard applied to him is without subject matter jurisdiction and dismissed without receipt of merits briefing or the record of the original trial, solidifying a circuit split in the process. Oddly, the motions panel posed the subject matter jurisdiction question as merits-driven inquiry based on a determination of whether "the [Supreme] Court's intervening decision in *Yeager II* raises a colorable issue as to the correctness of *Yeager I* [the Fifth Circuit opinion]," App. 11a, and answered that "there is no basis to conclude that *Yeager II* created an intervening change or 'correction' in the applicable law." App. 14a. This is an odd view of the Court's decision in *Yeager*, given that it reversed the Fifth Circuit and did not purport to do so on the basis of factual error. Indeed, this Court remanded *Yeager* with instructions for the Fifth Circuit to apply the newly articulated legal standard to the considerable trial record. All Shelby seeks is application of that standard to his case.

The Fifth Circuit's eccentric treatment of the issue may be explained by its implication that this Court's decision to accept certiorari in Yeager's case while denying it in Shelby's constituted a

prejudgment of the outcome under the standard that was to be announced thereafter. At this stage the only jurisdictional question before the Fifth Circuit should have been whether Shelby's appeal was one asserting a double jeopardy claim following a final judgment of acquittal.

REASONS FOR GRANTING THE PETITION

1. The Fifth Circuit's refusal even to accept appellate jurisdiction over this matter creates or expands a conflict among the circuits and represents a rejection of this Court's decision in *Yeager*. By elevating the burden on the acquitted defendant and forcing the defendant to account for arguments and inferences that are both absurd and beyond the actual trial record, the Fifth Circuit continues to elevate the burden beyond the simple, "practical" approach first articulated in *Ashe* and strengthened in *Yeager*.

2. To be clear, there is subject matter jurisdiction over this appeal. This Court has long held that the collateral order doctrine applies to double jeopardy appeals as a category of appealable interlocutory orders so long as they involve an actual attachment of jeopardy, and is not applied by analyzing the merits of an individual appeal in advance of briefing. *Behrens v. Pelletier*, 516 U.S. 299, 311-12 (1996); *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994). Pretrial orders denying a defendant's motion to dismiss an indictment on Double Jeopardy issue preclusion grounds are final decisions subject to appeal under 28 U.S.C. § 1291. *Abney v. United States*, 431 U.S. 651, 662 (1977).

3. Here, the Fifth Circuit, at the Government's urging, read a few sentences of *dicta* from *Richardson v. United States*, 468 U.S. 317 (1984), to require that Shelby prove the merits of his case before jurisdiction would attach, and erred in the supposition of the merits in any event. Because the Fifth Circuit's interpretation of *Richardson* creates a general merits-based subject matter jurisdiction threshold and conflicts with *Abney*, *Behrens*, *Digital Equipment*, and the decisions of multiple circuits, this Court should grant certiorari.

4. While the Fifth Circuit's jurisdictional ruling is in error, that error is grounded in an implausible reading of this Court's decision in *Yeager* as announcing no new or different law on the merits even as compared to the Fifth Circuit's reversed opinion in the same case. The Court may therefore prefer to simply grant certiorari and remand this matter with instructions to decide this case on the merits in light of that decision, as it has done in the past. *E.g.*, *San Paulo State of the Federations Rep. of Brazil v. American Tobacco*, 535 U.S. 229 (2002) (summarily granting certiorari, vacating Fifth Circuit's judicial recusal standard, and remanding without merits briefing). Or, if this Court finds the logic of the Fifth Circuit's issue preclusion analysis as to Shelby too impractical, reverse and render judgment.

I. The Fifth Circuit's Decision Misreads This Court's Holding in *Yeager* Regardless of Any Jurisdictional Error or Conflict.

While the Fifth Circuit appears to have acknowledged that any ruling in *Yeager* that

substantively altered the standard applicable to Shelby's issue preclusion argument would be retroactively available to him under longstanding law of the case rules,[1] it concludes that this Court's decision in *Yeager* did not materially disagree with the Fifth Circuit's legal standard in that case. App. at 11a, 14a. Thus, to the Fifth Circuit, *Yeager* posed no intervening change in the law. Noticeably, the Fifth Circuit's motions panel did not include any judge who had participated in the earlier appeal and its decision came in advance of briefing or receipt of the record.

A decision by this Court is retroactively applicable to all cases pending in the federal system prior to final judgment. *Griffith v. Kentucky*, 479 U.S. 314 (1987). Failure to apply a "newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." *Id.* at 713.

Likewise, a prior decision on appeal in any case is open to subsequent challenge under the law of the case rules where an intervening decision of this

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[1] As the Fifth Circuit has itself put it: "we are free to reconsider the correctness of a panel decision . . . if the Supreme Court has handed down an intervening decision that implicitly or explicitly overrules one of our prior decisions. *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1103 (5th Cir. 1997). A leading treatise describes this setting — where there has been an intervening change in law — as the "most obvious justification[]" for departing from the law of the case and cites intervening decisions by a "court higher in the hierarchy of a single court system" as being among "the easiest cases." 18B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4478 (2002).

Court, like *Yeager*, calls its holding into question. *See, e.g., Castro v. United States*, 540 U.S. 375, 384 (2003). This is particularly true of cases, like Shelby's, that have not yet reached a final judgment on remand. *United States v. U.S. Smelting & Refin'g Co.*, 339 U.S. 186, 198 (1950); *Spigella v. Hull*, 481 F.3d 961, 964-65 (7th Cir. 2007); 18B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4478 (2002) ("[t]here is a particularly strong tendency to 'get it right' during all trial-court proceedings before the first final trial-court judgment.").

There is little cause for doubting that the Fifth Circuit applied the same issue preclusion standard to Yeager and Shelby in its original decision. *See Yeager*, 521 F.3d 367. Both men were tried together before the same jury on the same substantive theory of culpability, and the Fifth Circuit decision handed down a consolidated decision as to both men. Likewise, there is little controversy over the outcome following this Court's review of that standard in its decision in *Yeager*. Nonetheless, in order to avoid any jurisdictional basis for evaluating the effect of this Court's decision in *Yeager* on Shelby's substantive double jeopardy claim, the Fifth Circuit appears to have given significant weight to this Court's decision to grant review and hear argument only as to Yeager, implying that the Court would have granted and reversed as to Shelby if it perceived the same error. App. at 6a. Thereafter, in peremptorily addressing the presupposed merits for purposes of evaluating appellate jurisdiction, the Fifth Circuit found its prior holding as to Shelby would be unaffected by application of this Court's holding in *Yeager*, because it regards this Court's

decision as leaving the legal standard effectively unchanged. It erred in both respects.

A. This Court's Decision to Grant Certiorari as to Yeager Does Not Amount to a Decision on the Merits as to Shelby.

While the Fifth Circuit did not explicitly declare that its peremptory dismissal and jurisdictional determination was driven by this Court's decision to grant review only as to Yeager, both the district court and the Fifth Circuit emphasized this fact in such a way as to make clear that they regarded the outcome as essentially foreclosed by this Court's decision to deny certiorari as to Shelby. App. 6a, 8a, 28a ("they didn't take his case though, did they?").

This Court is not a court of general error correction. The decision to grant or deny certiorari involves a host of considerations apart from the existence of error in any given case. *Singleton v. Comm'r*, 439 U.S. 940, 942 (1978) (Stevens, J., on denial of pet. for cert.). As the Court observed in *Griffin*:

> As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases

> subsequently to flow by unaffected by that new rule."

479 U.S. at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971)) (citation omitted). Thus, any decision by this Court is available to Shelby or any other Defendant at a subsequent stage of their proceedings, even where this Court has previously denied review. *E.g.*, *United States v. Matthews*, 312 F.3d 652 (5th Cir. 2002) (applying rule in *Apprendi* to defendant on second appeal presenting the same issue despite this Court's denial of certiorari as to the same defendant one month prior to grant in *Apprendi*); *see also Lisle v. Comm'r*, 541 F.3d 595 (5th Cir. 2008) (recalling mandate and correcting decision as to one of two co-appellants after this Court's reversal as to another).

In this case, the Court granted review in *Yeager* to address the proper issue preclusion standard to be applied in a case of partial verdicts. Having announced that standard (which plainly differs from the standard adopted by the Fifth Circuit), it did not attempt to apply it even *as to Yeager*. Rather, it left the merits determination to the Fifth Circuit on remand. To imply that a majority of the Court had already made a merits determination as to Shelby at the certiorari stage, as the Fifth Circuit hints and the district court openly suggested, App. 28a, 35-36a, 42a, defies reason.

B. This Court's Decision in *Yeager* Set a Standard Materially Different from the One the Fifth Circuit Applied to Yeager and Shelby.

The Fifth Circuit's motions panel suggests that this Court's decision in *Yeager* did not announce a rule of law different from the one applied by the Fifth Circuit to Yeager and Shelby. This conclusion is difficult to square with this Court's decision. Collectively, this Court's decisions in *Ashe* and *Yeager* confine the issue preclusion analysis inquiry into what the jury determined to the points *actually* in controversy at trial and require a realistic assessment of the record. *See Ashe v. Swenson*, 397 U.S. 436, 444 (1970). The *Ashe* review is a matter of legal, logical analysis into the elements of the acquitted counts focusing on what was actively contested at trial. A court reviews the entire record (but, after *Yeager*, not unanswered counts) to determine what points or issues were actually in controversy. Then, given the verdict and questions presented to the jury, the reviewing court determines what fact disputes the jury had to resolve to reach that verdict. *See id.*; *Yeager*, 129 S. Ct. at 2367. While an understanding of the entire record is necessary to identify those issues, that review should not be difficult in this case given the limited points in controversy.

The notion that *Yeager* did not amount to an intervening change of law so as to at least require its consideration on the merits to pending cases is difficult to fathom. This is particularly true of Shelby who was a Defendant in the same case and an appellant in the same appeal. While there were

differences in the pattern of acquittals between the two defendants, the scheme the Government alleged was the same and the legal issue confronting both was and is identical: does the determination of what the original jury decided involve explanation of the hung counts or speculation into the jury's thinking beyond an examination of the factual issues actually contested in the first trial. The result as to both men was driven by a standard — since rejected — that previously produced an admittedly irrational answer as to Yeager and a wholly improbable one as to Shelby.

C. The Fifth Circuit's Original Attempt to Rationalize Shelby's Acquittals Fails Under This Court's Double Jeopardy Standards, Particularly After *Yeager*.

If this Court's decision in *Yeager* established anything, it was that the Government's right to try the same factual allegations across overlapping theories of conviction is not on par with the defendant's right to repose following a final judgment of acquittal. Shelby's jury decided *something* when it acquitted him and the other Defendants. And yet, the Fifth Circuit's decision not only denies Shelby preclusive relief from that judgment, it refuses even to reach the merits of that question following this Court's decision just last Term reversing its legal standard in the same case. This was the error underlying the Fifth Circuit's view of the merits and jurisdiction.

1. The only realistic explanation of the acquittals was that the jury rejected the Government's theory that Shelby was participating in a scheme to inflate the stock price.

Shelby's appeal is not only within the collateral order jurisdiction of *Abney*, it is also meritorious. Given that Shelby readily admitted the details of his trades, the only issue actively contested was whether he was a participant in a conspiracy to hide the nonexistence or hopeless dysfunctionality of his company's software. Shelby, as well as Yeager and Joe Hirko, the third technology defendant, took the stand and testified vehemently that the software was functional and there was no scheme to mislead anyone concerning its development. The Government, largely relying on witnesses who were themselves avoiding criminal charges, struggled to argue otherwise, and the jury acquitted Shelby with respect to his sales in June 2000 despite their massive size and acquitted his two colleagues of some but not all the counts against them. This was not a case of a mixed verdict where the jury voted to convict in part and acquit in part. Rather, this is a case of a partial verdict where the jury acquitted as to every charge it reached. The Fifth Circuit's original opinion conjured a supposedly separate fact question not posed at trial: if Shelby knew of and participated in the fraud did he also use that knowledge when he traded? The question of "use" of knowledge of a fraud was not, on this trial record, separate from the question of the participation and existence of the conspiracy in the first instance. No lawyer would seriously argue that his client was

engaged in massive fraud but managed not to "use" that knowledge when he allegedly profited from it. Indeed no one made any such argument at this trial. Rather, it is a product of speculation of the very sort rejected in *Yeager*.

The only "realistic" explanation for the acquittals is that the jury agreed that the Defendants were not participating in a scheme to "pump and dump" stock based on misrepresentations about the functionality of the software. When the jury acquitted Shelby of his insider trading counts, it found that he did not "use" inside information, because he never had it. In other words, in the issue preclusion analysis, it is as though Shelby had been tried only for the trades the jury reached. The Government's effort to start over, using the same factual theory of culpability after the acquittal, simply cannot stand after this Court's decision in *Yeager*.

2. The Fifth Circuit theory of selective "use" of the knowledge of the fraud was compelled by the standard *Yeager* rejected.

Here, by relying exclusively on its prior decision, the Fifth Circuit found that the jury could have acquitted Shelby of his later-in-time insider trading counts and not his earlier counts, because those earlier sales took place well after his options vested. In other words, the jury might have believed that Shelby "used" his knowledge of the alleged conspiracy and fraud to sell his earlier shares and managed to put it out of his mind or ignore it later in June when he netted $5 million in sales. The court supports this supposition by assuming that the jury believed

Shelby selectively when he said he sold because he was uncomfortable being in the stock market at all. The Fifth Circuit noted that the stock price had risen above the strike price by November 1999 — a few months after the 1999 Options vested but a few months before Shelby exercised them and sold the resulting stock.[2] In its reasoning, the court ventures into facts and argument that were not before the jury and that contradict undisputed evidence that was.

The Fifth Circuit found the distinction between the timing of the acquitted and hung counts "obvious" and reasoned that the jury could have made the distinction "on its own." *Yeager*, 521 F.3d at 373 n.11. The notion that the jury believed Shelby was participating in stock fraud in March while profiting innocently in June is thus not only absurd but wholly speculative. A court cannot follow the *Yeager-Ashe* framework for a practical analysis and ground it on such remote conjecture about what a jury might have come up with "on its own."

This Court should grant certiorari and reverse or summarily remand with instructions to reconsider in light of the Court's substantive holding in *Yeager*.

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[2] The jury did hear uncontested testimony on the economics of exercising options and trading the resulting stock. *See* Tr. 6747-48. Thus, it is highly unlikely the jurors would have reasoned that Shelby could have sold when he would not have made any money.

II. The Fifth Circuit's opinion created a conflict among circuits and thwarts *Abney* by finding no jurisdiction over an order denying a motion to dismiss on double jeopardy grounds.

The Fifth Circuit committed a "drive by jurisdictional ruling" against Shelby, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998), and its decision in this case undermines this Court's collateral order jurisprudence by finding subject matter jurisdiction lacking over an order denying double jeopardy relief to a defendant who has been acquitted by a final judgment, and does so by deflating the Court's substantive holding in *Yeager* scarcely after its ink has dried. The appeal here lies squarely within this Court's holding in *Abney* and the appellate jurisdiction it recognizes. The Fifth Circuit's attempt to recast the subject matter jurisdiction question into one of "colorability" or "frivolity" creates a conflict with the Tenth Circuit and other circuits by misreading *Richardson*.

A. The collateral order doctrine is sparingly applied, particularly in criminal cases.

Appeal to the circuit courts lies only from final decisions of the district courts unless an order is a final disposition of a claimed right which is separable from any claim. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). While the collateral order doctrine is often invoked by hopeful litigants, this Court has strictly limited its application, particularly in criminal cases, in deference to the limited jurisdiction over interlocutory orders granted by Congress. The collateral order doctrine is

stringently applied to only protect orders governing important rights, typically those of a constitutional dimension. *See Will v. Hallock*, 546 U.S. 345, 350 (2006) (surveying cases applying the *Cohen* doctrine to absolute, qualified, presidential and Eleventh Amendment immunity, and double jeopardy); *Digital Equip. Corp.*, 511 U.S. at 869-71 (same).

In criminal cases, the doctrine applies only to three types of interlocutory requests: motions to reduce bail, motions to dismiss on double jeopardy grounds, and motions to dismiss under the Speech or Debate Clause. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (citing *Stack v. Boyle*, 342 U.S. 1 (1951), *Abney*, 431 U.S. 651, and *Helstoski v. Meanor*, 442 U.S. 500 (1979) respectively). In the latter two categories, the collateral order doctrine is particularly apt because the right asserted is the right not to be tried. *Sell v. United States*, 539 U.S. 166, 190-91 (2003) (Scalia, J., dissenting).

This Court has recognized the applicability of the collateral order doctrine to pretrial orders rejecting claims of former jeopardy as they constitute "final decisions" and thus qualify for appellate review under Section 1291. *Abney*, 431 U.S. at 662. In doing so, double jeopardy claims were added to the small class of collateral orders subject to appeal as they challenge the very authority of the Government to hale a defendant into court to face trial. *Id.* at 659. Thus, such claims are in the nature of an immunity defense, that is, a right to not stand trial at all. *See Behrens*, 516 U.S. at 306.

B. At the Government's urging, the Fifth Circuit read *Richardson* as having silently abrogated *Abney*.

This Court's decision in *Richardson* reaffirmed its holding in *Abney* by recognizing a right to immediate appellate review of a denial of double jeopardy relief wherever the proceedings against the defendant have ripened to the point that jeopardy has attached. *Richardson*, 468 U.S. at 322. As Shelby has undeniably stood trial to verdict and been acquitted, his double jeopardy appeal is "colorable" under *Richardson* and there is no basis for dismissal of his appeal on jurisdictional grounds, as the Tenth Circuit and others have recognized.

The Fifth Circuit, however, read two statements of *dicta* from *Richardson* together finding they "strongly suggest" that "a 'colorable' claim is a prerequisite for jurisdiction," App. 10a, and reads the word "colorable" to mean meritorious rather than plausibly stating a claim within the realm of the Double Jeopardy Clause — that is, one with an actual attachment of prior jeopardy. The Fifth Circuit has misread *Richardson* as creating a wholesale, merits-based bar to any double jeopardy appeal. At bottom, the Fifth Circuit's analysis improperly conflates the merits of the appeal with jurisdiction over that appeal. *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1900 (2009). But as this Court made clear this past Term: "Jurisdiction over the appeal, however, 'must be determined by focusing upon the category of order appealed from, rather than upon the strength of the grounds for reversing the order.'" *Id.* (quoting *Behrens*, 516 U.S. at 311).

First, this concept conflicts with a more clear conceptual precedent that collateral order jurisdiction flows from the category of order and is warranted by the importance of the right at issue in the case, not from the merits of an individual case. *See Abney*, 431 U.S. at 661 (the Double Jeopardy Clause protects interests wholly unrelated to the propriety of any subsequent conviction). Consequently, appealability of an order is judged by the category of that order, not the individual qualities of the appeal. *Johnson v. Jones*, 515 U.S. 304, 315 (1995); *Digital Equip. Corp.*, 511 U.S. at 868. Thus, no matter how extraordinary or banal a particular order may be, appellate jurisdiction over it depends on the issue it addresses, and nothing else. *See United States v. MacDonald*, 435 U.S. 850, 857 n.6 (1978). This is true even if the appeal is deemed — rightly or wrongly — to be "frivolous." *Behrens*, 516 U.S. at 311; *see Abney*, 431 U.S. 651 (Court finds appellate jurisdiction but quickly disposes of the merits).

Second, because the words are both often used in case law with ambiguity, the Fifth Circuit's use of the word "colorable" is nebulous, as is the case with "jurisdiction." *See Steel Co.*, 523 U.S. at 90 ("Jurisdiction is a word of many, too many, meanings.") (citation omitted). While this Court often uses "colorable" to mean "plausible," other sources simultaneously define it with the opposite meaning. *See* BLACK'S LAW DICTIONARY 259 (7th ed. 1999) (alternately defining "colorable" as appearing to be valid and "counterfeit"). Such a broad range of meaning leads to the ambiguous use of the term. The opinion below fails to define it at all, but seems to equate it with "frivolousness" — the threshold

necessary for a defendant to obtain a stay of trial while his or her interlocutory double jeopardy appeal proceeds. *See United States v. Dunbar*, 611 F.2d 985 (5th Cir. 1980) (en banc).

Both *Richardson* and the precedent from which it draws the idea of a "colorable" double jeopardy claim use the term in the sense of whether the procedural circumstances give rise to a double jeopardy circumstance at all, not whether the merits of the appeal itself are plausible. *Richardson*, 468 U.S. at 322 (citing *MacDonald*, 435 U.S. at 862 ("a double jeopardy claim . . . requires at least a colorable showing that a defendant once before has been in jeopardy. . . ."). That nuance was lost on the motions panel below. There is no question Shelby — who survived a three-and-a-half month trial without any finding of guilt and with multiple, final acquittals — has been in jeopardy.

The Fifth Circuit's misreading of *Richardson* and *MacDonald* also directly conflicts with the Tenth Circuit's decision in *United States v. Wood*, 950 F.2d 638, 641-42 (10th Cir. 1991) (distinguishing jurisdiction under *Abney* from any finding that a claim is "colorable" or "frivolous"), as the Fifth Circuit acknowledged. App. 10-11a. And while the Fifth Circuit viewed itself as joining a "majority" of circuits that treat Richardson as creating a merits-based jurisdictional threshold, *id.*, it misread those decisions, citing them as double jeopardy appeals. In fact, the cases the Fifth Circuit cites concerned appeals in circumstances that did not involve the former jeopardy embraced by *Abney*, *Richardson*, and this case. For example, the Eleventh Circuit's decision in *United States v. Bobo*, 419 F.3d 1264

(11th Cir. 2005), reads *Richardson* like Shelby and the Tenth Circuit do — as confirming collateral order jurisdiction whenever there has been "a jeopardy terminating event." *Id.* at 1267. Thus, the Fifth Circuit has created conflict not only with the Tenth Circuit but with the Eleventh Circuit as well. The remaining cases cited by the Fifth Circuit do not involve former jeopardy at all as they all involve former *civil* proceedings — another context involving no actual attachment of jeopardy. *See United States v. Bhatia*, 545 F.3d 757 (9th Cir. 2008); *United States v. Hickey*, 367 F.3d 888 (9th Cir. 2004); *United States v. Andrews*, 146 F.3d 933 (D.C. Cir. 1998) (in addition movant never "suffered jeopardy" as he was not even named in prior SEC civil action). Notably, the Eighth Circuit, which the Fifth also cited as part of its "majority," recognized that the colorability threshold for collateral order jurisdiction requires only a showing of previous jeopardy and the threat of repeated jeopardy. *United States v. Abboud*, 273 F.3d 763, 766 (8th Cir. 2001). Thus, the Fifth Circuit is alone in creating a conflict and fashioning a rule conditioning appellate jurisdiction over the merits beyond examining whether a jeopardy terminating event has occurred.

The motions panel opinion below proclaims itself to be joining a "majority" with the Eighth, Ninth, and D.C. Circuits that, on closer examination, did not exist until the Fifth Circuit declared it so in a published, *per curiam* decision. This Court should grant certiorari and put an end to this gross misreading of *Richardson*.

CONCLUSION

The petition for writ of certiorari should be granted, and this Court should vacate the judgment below and remand for a determination of this matter in light of *United States v. Yeager*. Alternatively, this Court should apply the logical analysis of *Ashe* and *Yeager* to reverse and render judgment in Shelby's favor.

Respectfully submitted,

SUSAN HAYS*
GEISLER HAYS, LLP
2911 TURTLE CREEK BLVD.
SUITE 940
DALLAS, TEXAS 75219
(214) 367-6040
shays@ghlawllp.com
**Counsel of Record*

DAVID SCHENCK
ANDREW WIRMANI
JONES DAY
2727 NORTH HARWOOD ST.
DALLAS, TEXAS 75201
(214) 969-5124
dschenck@jonesday.com
aowirmani@jonesday.com

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2050
DALLAS, TEXAS 75201
(214) 270-1400
etomko@cttlegal.com
jross@cttlegal.com

COUNSEL FOR PETITIONER

June 2010

APPENDIX

APPENDIX A

REVISED MAY 14, 2010

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[FILED:
April 23, 2010]

No. 10-20148

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

REX SHELBY

Defendant - Appellant

Appeals from the United States District Court for the Southern District of Texas

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Before KING, STEWART and HAYNES, Circuit Judges.

PER CURIAM:

The defendant, Rex T. Shelby, filed a pretrial appeal from an order by the district court that denied his motion to dismiss, on double jeopardy grounds, a

Seventh Superseding Indictment filed against him on November 9, 2005. Presently before this court is the Government's motion to dismiss Shelby's appeal. The Government contends that we lack subject-matter jurisdiction over the appeal because Shelby's double jeopardy claims are "not colorable" and "frivolous." For the reasons discussed below, we agree and dismiss the appeal.

I. Background

A. Shelby's Trial, Reindictment, and First Motion to Dismiss on Jeopardy Grounds

Shelby's case relates to the collapse of the Enron Corporation and its subsidiaries. Shelby was a senior executive at Enron Broadband Services ("EBS"), Enron's broadband and telecommunications unit. Shelby, along with co-defendants F. Scott Yeager and Joseph Hirko, were indicted in November 2004 on various counts of conspiracy to commit wire and securities fraud; securities fraud; wire fraud; insider trading; and money laundering. In July 2005, a jury acquitted Shelby on four of his insider trading counts-those involving trades made in the summer of 2000 (the "Summer 2000" counts) — but hung on the remaining counts against him. The jury also acquitted or hung as to some counts against Yeager and Hirko. The district court declared a mistrial on the hung counts. The Government subsequently obtained new indictments against all of the defendants, including the Seventh Superseding Indictment against Shelby.

The Seventh Superseding Indictment recharged Shelby with four insider trading counts relating to trades made in early 2000 (the "Early 2000" counts)

on which the jury had hung. The indictment also charged one count of conspiracy and one count of securities fraud. Shelby moved to dismiss the indictment on double jeopardy grounds. The district court denied the motion, *United States v. Shelby*, 447 F. Supp. 2d 750 (S.D. Tex. 2006), and we affirmed, *United States v. Yeager*, 521 F.3d 367 (5th Cir. 2008) (*Yeager I*), *rev'd on other grounds*, 129 S. Ct. 593 (2008).

In support of dismissal, Shelby's chief argument was that in acquitting as to the Summer 2000 counts, the jury necessarily decided issues of fact that had preclusive effect as to the counts in the new indictment. Specifically, Shelby asserted that, by acquitting, the jury must necessarily have determined that he lacked the intent to defraud. The parties do not dispute that a finding that Shelby lacked the intent to defraud would defeat a necessary element of the insider trading and securities fraud counts in the new indictment, therefore precluding prosecution as to these counts. *See United States v. Brackett*, 113 F.3d 1396, 1398 (5th Cir. 1997) ("[C]ollateral estoppel . . . will completely bar a subsequent prosecution if one of the facts necessarily determined in the former trial is an essential element of the subsequent prosecution.").

The district court determined and we agreed, however, that in acquitting as to the Summer 2000 counts, the jury did not necessarily decide that Shelby lacked intent. Rather, "[a]fter an extensive examination of the record," we affirmed the district court's conclusion that the jury's acquittal could have hinged on the fact that the Government had failed to prove beyond a reasonable doubt that Shelby actually

used or relied upon material nonpublic information in his possession at the time he made the trades-another element of insider trading. *See Yeager I,* 521 F.3d at 372-73. The district court observed that "the government presented little to no evidence that Defendant Shelby made any material misrepresentations or acquired material non-public information in June and July 2000, the dates of Shelby's acquitted counts of insider trading." *Shelby,* 447 F. Supp. 2d at 761. The district court also noted that, by contrast, "the government presented substantial evidence that Defendant Shelby either made material misrepresentations or acquired material non-public information" before the trades that were the subject of the Early 2000 counts. *Id.* at 761-62.

We agreed with the district court's reasoning, noting also that Shelby had specifically testified that he made the Summer 2000 trades "because he was uncomfortable with being in the stock market" and in reliance on a friend's advice on when to sell. *Yeager I,* 521 F.3d at 372. We held that the jury was properly instructed that a trade that "used" or was "motivated by" inside information was an element of insider trading. *Id.* at 372-73. We concluded that the jury did not necessarily find that Shelby used insider information in making the Early 2000 trades:

> In acquitting Shelby of the later [Summer 2000] counts, the jury could have differentiated between the two different sets of trades. The jury could have found that Shelby did not use insider information when he conducted the trades that underlie the Summer 2000 Insider Trading Counts but did use insider information when he conducted

> the trades that underlie the Early 2000 Insider Trading Counts. The evidence at trial supports this distinction.

Id. at 373. We noted specifically that Shelby's trading patterns were markedly different between the Early 2000 and Summer 2000 trades. In the Early 2000 trades, Shelby exercised options that had vested in June 1999. We speculated that "[f]rom this delay, the jury could have rationally concluded that Shelby purposely waited for the stock price to go up before exercising his 1999 options and that Shelby knew the price would go up because of his knowledge of insider information." We noted that by contrast, with the Summer 2000 trades, Shelby exercised his options as soon as they vested. *Id.*

Three days after granting certiorari as to his co-defendant Yeager, *Yeager v. United States*, --- U.S. ----, 129 S. Ct. 593 (2008), the Supreme Court denied Shelby's petition for certiorari, *Shelby v. United States*, --- U.S. ----, 129 S. Ct. 595 (2008); *reh'g denied*, --- U.S. ----, 129 S. Ct. 977 (2009).

B. Yeager's Trial, Reindictment, and Motion to Dismiss on Jeopardy Grounds

In *Yeager I*, 521 F.3d at 367, we also rejected the double jeopardy claims of Shelby's co-defendants, Hirko and Yeager. At the 2005 trial, the jury acquitted Yeager of securities fraud, wire fraud, and conspiracy but hung on 20 counts of insider trading and 99 counts of money laundering. The Government reindicted Yeager on the hung charges.

Yeager moved to dismiss the new indictment, urging that double jeopardy barred the insider trading counts. Yeager argued that in acquitting on

the fraud and conspiracy counts, the jury necessarily decided that he did not possess insider information, an element of insider trading. We agreed that "the jury, acting rationally, could have acquitted Yeager on securities fraud only by concluding that he did not have insider information." *Id.* at 376-77. We nevertheless concluded that collateral estoppel did not bar the insider trading counts. Applying our precedent in *United States v. Larkin*, 605 F.2d 1360, 1370 (5th Cir.1979), we considered the hung counts and observed that if "the jury found that [Yeager] did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering. Instead, the jury hung." *Yeager I*, 521 F.3d at 379. We reasoned that the hung counts therefore created uncertainty about what the jury necessarily decided. *Id.* In light of this uncertainty, we concluded that collateral estoppel did not apply. *Id.* at 379-80.

The Supreme Court granted certiorari on Yeager's appeal. The Court then abrogated our precedent in *Larkin* and reversed, concluding that we erred in weighing the effect of the hung counts in determining the preclusive effect of the acquittals. *Yeager v. United States*, --- U.S. ----, 129 S. Ct. 2360, 2368 (2009) (*Yeager II*). The Court held:

> [T]he consideration of hung counts has no place in the issue-preclusion analysis . . . . To identify what a jury necessarily determined at trial, courts should scrutinize a jury's decisions, not its failures to decide. A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it.

> Even if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable. Thus, if the possession of insider information was a critical issue of ultimate fact in all of the charges against the petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element.

Id. at 2368-69 (internal quotation marks omitted). The Court reasoned that a "contrary conclusion would require speculation into what transpired in the jury room," and noted that "[i]f there is to be an inquiry into what the jury decided, the evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration." *Id.* at 2368 (internal quotation marks omitted; quoting *Packet Co. v. Sickles*, 72 U.S. (5 Wall.) 580, 593 (1866)). On remand, we dismissed the indictment against Yeager. *United States v. Yeager*, 334 Fed. Appx. 707 (5th Cir. 2009) (*Yeager III*).

After *Yeager II*, the Court granted certiorari as to Hirko and remanded for further consideration in light of *Yeager II*. *Hirko v. United States*, 129 S. Ct. 2858 (2009).

C. Shelby's Second Motion to Dismiss on Jeopardy Grounds

After the Court issued *Yeager II*, Shelby renewed his motion in the district court to dismiss the indictment, contending that *Yeager II* was an intervening change in the law that provided a new

basis to evaluate his jeopardy claims. On January 29, 2010, the district court denied Shelby's motion to dismiss, but declined to find his claims frivolous. On January 29, 2010, Shelby filed an interlocutory appeal from that order, premised on raising a colorable issue of double jeopardy. *See Abney v. United States,* 431 U.S. 651 (1977); *United States v. Dunbar,* 611 F.2d 985 (5th Cir.1980) (en banc).[1]

The Government then brought the present motion to dismiss the appeal, arguing that we lack jurisdiction over the appeal because Shelby's double jeopardy claim is "not colorable" and "frivolous."

II. The Legal Standards

Under the collateral order doctrine, we have jurisdiction under 28 U.S.C. § 1291 to review a pretrial order rejecting a claim of double jeopardy, provided the jeopardy claim is "colorable." *Richardson v. United States,* 468 U.S. 317, 322 (1984) ("[T]he appealability of a double jeopardy claim depends upon its being at least 'colorable.'"). A colorable claim "presupposes that there is some possible validity to a claim." *Id.* at 326 n. 6. A claim is not colorable if "no set of facts will support the assertion of [the petitioner's] claim of double

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[1] In this circuit, district courts follow a "summary procedure" under which the district court is required to assess, after considering the merits of the motion to dismiss on the basis of double jeopardy, whether the motion is frivolous. If the district court makes such a finding, then an interlocutory appeal from the denial of that motion does not deprive the district court of jurisdiction to proceed with trial. *Dunbar,* 611 F.2d at 988.

jeopardy." *Id.* "It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy." *Abney*, 431 U.S. at 662 n. 8; *see also United States v. Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005) ("[F]rivolous claims and arguments that have already been squarely decided by precedent do not afford appellate courts jurisdiction to review interlocutory orders.").

Shelby disputes that the colorability requirement is in fact jurisdictional, pointing to the Tenth Circuit's conclusion in *United States v. Wood*, 950 F.2d 638, 642 (10th Cir. 1991), that "[t]he summary determination of whether a defendant has raised a colorable claim is not necessary to our jurisdiction. Rather, it is a discretionary action within our 'supervisory powers' to ensure that defendants do not engage in 'dilatory appeals.'" *Richardson*, however, states that a "colorable double jeopardy claim [is] appealable under 28 U.S.C. § 1291," and that "the appealability of a double jeopardy claim depends upon its being at least colorable." 468 U.S. at 322. Read together, these statements strongly suggest that a colorable claim is a prerequisite for jurisdiction. The majority of the circuits to have considered the issue treat colorability as jurisdictional. *See United States v. Bhatia*, 545 F.3d 757, 760-61 (9th Cir. 2008) ("Because [the defendant's] claims of res judicata and collateral estoppel are not colorable, we dismiss this interlocutory appeal for lack of jurisdiction."); *Bobo*, 419 F.3d at 1267; *United States v. Hickey*, 367 F.3d 888, 891 (9th Cir. 2004) ("Both the Supreme Court and this court . . . have held that we have interlocutory appellate jurisdiction to reach the

merits only of 'colorable' double jeopardy claims."); *United States v. Abboud*, 273 F.3d 763, 769 (8th Cir. 2001) ("The Abbouds have not raised colorable claims of double jeopardy . . . . For th[is] reason[ ] we lack jurisdiction over these interlocutory appeals, and they are dismissed."); *United States v. Andrews*, 146 F.3d 933, 942 (D.C. Cir. 1998) ("[T]he Supreme Court held in *Richardson v. United States* that a claim of double jeopardy must be at least 'colorable' to confer interlocutory jurisdiction on an appellate court."). We join these circuits in concluding that a colorable, non-frivolous claim is a prerequisite to our jurisdiction under 28 U.S.C. § 1291 to hear a pretrial double jeopardy appeal.

We have already ruled upon and rejected Shelby's motion to dismiss the present indictment, and "[a]bsent an en banc or intervening Supreme Court decision," we may not overrule any part of that prior panels decision. *United States v. Martinez-Rios*, 595 F.3d 581, 586 n.5 (5th Cir. 2010). Therefore, jurisdiction, and ultimately relief, are available now only if the Court's intervening decision in *Yeager II* raises a colorable issue as to the correctness of *Yeager I*. We conclude that it does not.

III. Analysis

Shelby asserts two reasons why *Yeager II* casts the correctness of *Yeager I* into doubt, both of which we conclude, after careful consideration, are frivolous.

1. The "Points in Controversy" Claim

Shelby first contends that *Yeager II* set out a requirement that a court attempting to determine what a jury necessarily decided must restrict its inquiry to the "points in controversy" at the trial.

According to Shelby, this requirement represents a "correction" in the law that affects the result in this case. Shelby draws his argument from the Court's statement in *Yeager II* that "[i]f there is to be an inquiry into what the jury decided, the evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration." *Id.* at 2368 (internal quotation marks omitted; quoting *Packet*, 72 U.S. (5 Wall.) at 593).

Shelby argues that whether he "used" insider information for the Early 2000 but not for the Summer 2000 trades was never a "point in controversy" in his case. Shelby contends that the Government never argued that Shelby relied on different information in completing the Early 2000 and Summer 2000 trades — to the contrary, the Government argued that Shelby made these trades based on a cumulation of inside information and did not differentiate between the types of information that may have motivated each trade. Shelby further urges that he, too, in defending his case, did not differentiate between trades but instead argued as to all of the trades that he had other reasons, unrelated to insider information, for selling his stock. Shelby argues that because the issue of whether or not he "used" insider information in the Summer 2000 trades as opposed to the Early 2000 trades was never a "point in controversy" at trial, we must necessarily conclude that the jury's basis for acquittal was lack of intent.[2]

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[2] Shelby also argues that because the Summer 2000 acquittals were premised on lack of intent, the

This argument has no merit. The test, as described by the *Yeager II* Court, is that in attempting to determine what the jury necessarily decided, the evaluating court should look not only to the "points in controversy on the former trial," *but also* to the parties' testimony and the questions submitted to the jury. The parties disputed as to all of the trades whether insider information was used. The testimony and evidence showed that different amounts of available information and different trading patterns were associated with the Early 2000 versus the Summer 2000 trades. And the jury was instructed that "use" was an element of insider trading. The district court and this court looked to precisely these things in concluding that the Summer 2000 acquittals had no preclusive effect as to intent.

Even if the test described by the *Yeager II* Court were not followed, however, there is no basis to conclude that *Yeager II*'s reference to "points in controversy" represents a "correction" in the law. *Yeager II* reached only the "narrow legal question" of whether a court may consider the effect of hung counts in evaluating what the jury necessarily determined. 129 S. Ct. at 2370. The *Yeager II* Court clearly found the consideration of hung counts to be a speculative undertaking out of keeping with the rule-which the Court *did not* otherwise accuse this court of violating — that a court must cabin its inquiry into what the jury necessarily determined to the points of controversy in the case, the arguments and evidence in the record, and the questions presented to the jury.

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conspiracy counts against him in the new indictment should also be dismissed.

And indeed, except for permitting the consideration of hung counts in determining what the jury "necessarily decided," our court has consistently followed this rule. *See, e.g., Garcia v. Dretke,* 388 F.3d 496, 503-04 (5th Cir. 2004) (in evaluating a jeopardy claim, a court is required "to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter" (quoting *Ashe v. Swenson,* 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970))); *United States v. Brackett,* 113 F.3d 1396 (5th Cir. 1997).

In short, even if the district court and this court did not adhere to the "points in controversy" test that Shelby urges — and the record does not support this contention — there is no basis to conclude that *Yeager II* created an intervening change or "correction" in the applicable law. Therefore, we have no basis to consider this issue as a basis for finding jeopardy in Shelby's renewed motion.

2. The "Consideration of Hung Counts" Claim

Shelby's second argument, on which he places considerably less emphasis, is that the district court and this court in fact considered the hung counts in determining that the Summer 2000 acquittals had no preclusive effect. Shelby contends that this conclusion (reached by both this court and the district court) necessarily resulted from "the need, since absolved, to reconcile the acquittals with the hung counts."

This argument has no merit. The district court's and this court's conclusions as to the Summer 2000 acquitted counts do not depend on any reference to the Early 2000 hung counts. We concluded that the

Government presented very little evidence that Shelby had access to insider information when the Summer 2000 trades were made; we credited Shelby's testimony that he did not rely on such evidence; and we noted that the jury had properly been instructed that the "use" of or reliance on insider information was an element of insider trading. These findings, by themselves, sufficiently support the conclusion that the jury's acquittal as to the Summer 2000 counts could have been premised on insufficient evidence of "use" of inside information.

It is true that both the district court and this court compared the substantial evidence of "use" of insider information that accompanied the Early 2000 hung counts to the relative absence of such information accompanying the Summer 2000 acquitted counts, and cited this distinction as one reason to conclude that lack of insider information, rather than lack of proof of intent, could have led the jury to acquit as to the Summer 2000 counts. But this type of comparison does not run afoul of *Yeager II*. *Yeager II* stands for the proposition that if an acquittal establishes that the jury necessarily determined a certain element of an offense, the court may not examine the effect of hung counts to undermine that determination by showing that the jury was necessarily inconsistent or confused in its conclusions. Nothing in *Yeager II* prohibits the type of comparison drawn in this case, in which the distinction was cited simply to demonstrate one possible rational basis for the jury's acquittal.

3. Shelby's Claims are Not Colorable

Shelby has failed to cite any intervening change or correction in the law effected by *Yeager II* that has

relevance to his double jeopardy claim, which a panel of this court has already considered and squarely rejected. The issues, as alleged in his motion to dismiss the indictment and in his response to the Government's motion to dismiss his appeal, are not close and are without arguable validity. Accordingly, Shelby has not raised a colorable claim and we are without jurisdiction to consider his appeal from the district court's denial of his motion. *Richardson,* 468 U.S. at 322.

Our conclusion as to the colorability of Shelby's claims is bolstered by the fact that his invocation of *Yeager II* appears largely to be pretext for revisiting the reasoning and outcome of our prior panel decision. Shelby's motion to dismiss the indictment argues at length that the prior panel made "factual errors in its analysis of Shelby's acquittals" and erred in its conclusion that "legally significant differing evidence" supported the Early 2000 as opposed to the Summer 2000 trades. Shelby does not contend that these conclusions are affected by *Yeager II,* but appears to assume that we could revisit these issues if *Yeager II* affected some other issue in his jeopardy claim. This of course is false — absent any change in the intervening law on a particular issue, we have no power to revisit another panel's legal and factual conclusions. *See Martinez-Rios,* 595 F.3d at 586 n. 5.

IV. Conclusion

Shelby has failed to raise a colorable double jeopardy claim. Accordingly, we DISMISS, for lack of subject-matter jurisdiction, his appeal from the district court's denial of his pretrial motion to dismiss and REMAND for trial.

DISMISSED and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

UNITED STATES OF AMERICA	§	[Filed: January 29, 2010]
	§	
vs.	§	
	§	**CRIMINAL NO. H-03-93**
	§	
REX SHELBY	§	

ORDER

IT IS HEREBY ORDERED that Defendant Rex Shelby's Motion to Dismiss on Grounds of Issue Preclusion is **DENIED. (Instrument No. 1607)** The court finds that Defendant Shelby's Motion to Dismiss on Grounds of Issue Preclusion was not frivolous.

The clerk shall enter this Order and provide copies to all parties.

SIGNED this 29th day of January, 2010, at Houston, Texas.

[/S/]

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 10-20148

[FILED:
May 17, 2010]

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

REX SHELBY
Defendant – Appellant

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING EN BANC

(Opinion 4/23/10, 5 Cir., _____, _____ F.3d _____)

Before Circuit Judges KING, STEWART and HAYNES.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in the regular active service of the

court having requested that the court be polled on Rehearings En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN KING
United States Circuit Judge

Order on pet EB trat as pan ren-REHG-6A

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
	§	**NO. H-CR-03-93-7**
vs.	§	November 23, 2009
	§	
	§	
REX SHELBY	§	

PRETRIAL CONFERENCE and MOTION HEARING
BEFORE THE HONORABLE VANESSA GILMORE

For the Government: Mr. Jack B. Patrick, AUSA
Mr. Douglas Wilson, AUSA
U.S. Department of Justice
1400 New York Avenue, NW
Washington, DC 20005

For the Defendant: Mr. Edwin J. Tomko
Mr. Jason M. Ross
Ms. Lea Courington
Curran Tomko Tarski, LLP
2001 Bryan Street, Suite 2050
Dallas, Texas 75201

Ms. Susan Hays
Geisler Hays, LLP

2911 Turtle Creek Blvd., Suite 940
Dallas, Texas 75219

Court Reporter: Bruce Slavin, RPR, CM

Proceedings reported by mechanical stenography and produced by computer-aided transcription.

THE COURT: All right. United States of America v. Rex Shelby.

For the United States.

MR. PATRICK: Your Honor, Jack Patrick and Doug Wilson for the United States.

MR. TOMKO: Your Honor, Ed Tomko, Jason Ross, Lea Courington and Susan Hays.

THE COURT: I'm sorry. I didn't get the last two names.

MR. TOMKO: Lea Courington, C-o-u-r-i-n-g-t-o-n, and Susan Hays.

THE COURT: Who is who?

MR. TOMKO: This is Lea and this is Susan.

MS. HAYS: Susan Hays.

THE COURT: All right. We are here ostensibly this morning, lawyers, for a pretrial conference, but what was left pending -- or what, I guess, is still pending is the motion that was filed by the Defendant back on July 10, 2009, that the Court did not rule on or address pending the decision of the Supreme Court

on the companion case that was pending for Scott Yeager. The briefing was done prior to the time that the case was remanded and a new decision was issued by the Fifth Circuit, but, obviously, I need to address and deal with the outstanding motion.

Mr. Tomko, do you want to speak further to it or do you all just want me to start talking?

MR. TOMKO: Your Honor, it's up to you. Miss Hays is here to

THE COURT: Oh. Ms. Hays.

MR. TOMKO: -- to speak for the Government --

THE COURT: For the defense. She'd like to speak for the Government and for the defense, but in this instance she probably wants to speak on behalf of the defense.

Do you want to speak further on your motion?

Y'all can have a seat, then.

Ms. Hays, then.

MS. HAYS: Your Honor, I did handle all the appellate briefing and the motion. I am here at your disposal if you'd like any more information on it.

THE COURT: Well, I don't want any more information, but I guess I was intrigued by some part of your motion. And I understand that your motion was filed on July 10, before the case was actually remanded and the new opinion issued by the Fifth Circuit, which, you know, obviously, just got issued on October the 19th of 2009.

But one of the things that you said or that the defense said in their motion was that the hung counts

weren't relevant to determining the effect of acquitted counts. I guess I have to beg to disagree with you on that, even in light of the Supreme Court's ruling that the hung counts are irrelevant to determining the effect of the acquitted counts, because, in fact, I think that the Supreme Court looked at the hung counts in determining what effect the acquitted counts were.

I think that the Supreme Court picked the right case in picking Yeager's as the one to grant cert. on and not Shelby's, and I think that they are different with respect to what counts Mr. Yeager was acquitted on and whether or not the elements on the counts that he was acquitted on were made it impossible, or at least in the Supreme Court's view, for the jury to have not acquitted him on the other counts where there were the same elements.

Mr. Shelby's situation is completely different. I mean, he got acquitted on some of the sales of stock that occurred in 2000 and not the sales of stock that occurred in 1999, and it wasn't the same sort of situation at all where there were elements that he was acquitted on that are still in the remaining counts that the Government is still left to try him on. So, I don't see it as -- I mean, I see that there are similar potential issues, but their situations are different just in terms of what counts Yeager got acquitted on and what the impact of those elements are on the remaining counts and what Mr. Shelby got acquitted on and what is still left to be tried in his case with respect to the counts he didn't get acquitted on.

I just don't see that the Supreme Court's decision in Mr. Yeager's case helps Mr. Shelby with respect to his motion to dismiss on grounds of issue preclusion.

MS. HAYS: Well, let me see if I can persuade you.

The Supreme Court made two corrections to the line of cases on issue preclusion in a criminal context. One, you don't consider the hung counts. You look at what verdict was actually returned, what did the jury acquit on. And, two -- and this is more important for Mr. Shelby's case and, frankly, for Mr. Yeager's -- you limit your review to the record, that is, to what points were actually in controversy at trial. Now, Yeager and Shelby and either Mr. Hirko were different as to which counts were acquitted.

THE COURT: Right.

MS. HAYS: They were not different as to what points were in controversy at the trial. All three of them deny there was ever a scheme. All three of them denied there was ever a problem with the EBS technology.

And as to Shelby's pattern of acquittals, he is acquitted later in time of insider trading counts. The Government never argued he changed his mind, his attitude, his criminal intent, between the January sales, the January securities fraud count, and the June and July acquitted counts. At trial they argued it was all the same.

And what the Supreme Court did was limit our analysis in reviewing acquitted counts and trying to decide if those acquitted counts tell us the facts that the jury decided that we can discern that underlies the remaining counts.

THE COURT: Well, what do you think that it is, given what he got acquitted on?

MS. HAYS: He gets acquitted of these later-in-time sales. And I will give you that there could be two different things the jury decided. They could have decided there was no scheme at all, in which case he should be acquitted of all the remaining counts. They could have decided he never had criminal intent. Maybe the other guys did, maybe there was a scheme, but Rex Shelby had no criminal intent, in which case he should also be acquitted of his remaining counts because of the way the Government chose to try this case with this unified scheme theory that they did not waver from with all Defendants or over time. They're stuck with that. They're stuck with the choice they made at trial and they don't get a second bite with a new theory. That's why it helps him.

THE COURT: Well, you don't see any differentiation between the later-in-time counts and the 1999 transactions?

MS. HAYS: The only difference hurts the Government, and that is there was more -- according to the Government, more bad facts, more bad inside information. If anything, under the Government's theory of the case, he was most culpable at the time he was acquitted or at the time of the counts for which he was acquitted.

THE COURT: Say that again. I'm sorry.

MS. HAYS: I said, if anything, the way the Government told their story of the case, that there was an analysts conference in January, the press releases go out and there was all these bad inside

documents, 'You guys knew that technology was failing' -- that only increased over time. It did not decrease over time. There was no purging of the inside information, no release of corrective information, according to the Government. If that's so, Rex Shelby would have been most culpable at the time of those summer counts he was acquitted of.

THE COURT: Or the later sales didn't have anything to do with that information.

MS. HAYS: That wasn't the Government's theory at trial.

THE COURT: I am talking about what the jury's decision was at this point in time.

MS. HAYS: Well, I am saying what arguments were put to the jury? What that "points in controversy" language limits us to was what was actually put to the jury.

And I have read the opening and closing arguments in this case more times than I care to count. They never made that argument. That's their problem. If they had tried this very complex case in a more complex manner, then we wouldn't have an argument. But they did try it in a simple manner. It's just a big scheme. It was pump and dump. There was no differentiation over time. That's why it helps Rex Shelby.

And that "points in controversy" language in the Supreme Court opinion -- those ideas came up in an amicus brief Rex Shelby filed in Yeager's case with the Texas Criminal Defense Lawyers Association. So, it was an argument he himself made to the Supreme Court.

THE COURT: They didn't take his case, though, did they?

MS. HAYS: Yeah. But they took his ideas. They took that point and limited it to the record --

THE COURT: Because his case was sufficiently different that Yeager's was the better case to take.

MS. HAYS: I think they didn't take his case because of the way the Fifth Circuit wrote the opinion.

THE COURT: What do you mean?

MS. HAYS: Well, in their opinion with Rex Shelby -- and, frankly, they made some varying errors in reading the record in this case.

They didn't read the stock price chart correctly. They say he should have sold in November, that he could have exercised options then before that January sale, except he wouldn't have made any money then. They didn't do the math right. The price wasn't high enough of those strike pipes [sic] for him to have made any money.

THE COURT: Okay.

MS. HAYS: So, that made no sense. They didn't get the stock price right. And, you know, Yeager presented the U.S. Supreme Court the cleanest version -- cleanest case to look at this issue of whether or not you consider hung counts at all or if you put on blinders, and they ruled, held, you do put on blinders or the hung counts don't mean anything. They're not a verdict, not like an acquittal.

THE COURT: I don't see you say that you don't look at them, that they don't mean anything. I mean,

obviously, we look at them to see whether or not the elements are the same.

MS. HAYS: Yeah, you look at the underlying elements, but you don't look at the answer the jury gave because it wasn't answered.

THE COURT: Of course, you don't look at the answer the jury gave, but you do look at the hung counts and you do consider the hung counts because you consider them to determine whether or not the elements on the hung counts are related to the elements in the acquitted counts.

MS. HAYS: And the elements of the acquitted insider trading counts are precisely the same as the elements of the remaining insider trading counts. And securities fraud, it's the same thing. It's the same elements. Insider trading is just another version of securities fraud. They overlap perfectly, both in the elements as a matter of law and how the Government chose to try this case.

And I will tell Your Honor in a complex case like this it's hard to make an issue preclusion argument. Issue preclusion works a lot better in a simple drug possession, drug conspiracy case.

THE COURT: It sure does.

MS. HAYS: But the way -- I tell you, we got lucky on this because of the way the Government tried it.

THE COURT: I guess I'm not convinced yet. I am still waiting to hear something that makes me feel differently.

MS. HAYS: I know it's been a long time since this trial; so, I will try to take you back to that.

They argued --

THE COURT: Since the several trials.

MS. HAYS: Right.

THE COURT: I have lost track of how many times I have tried this case now. Oh, my goodness.

MS. HAYS: They tried -- And you know there were five defendants at the time, that the three technology defendants were basically one case and the accounting defendants were separate -- Yeager, Hirko and Shelby.

THE COURT: Oh, god. Don't do this. I don't need to do this. I already know all that. Oh, my god. What are you doing? I was there. You weren't.

MS. HAYS: Right. The evidence they put on -- And if it would be helpful to Your Honor -- I know you don't want any more information, but I can give you a simple chart showing where this is and tying it to the record. They never made an argument, they never put on any evidence that his state of mind changed between the early 2000 sales and the securities fraud count and those acquitted counts in the summer.

THE COURT: The 1999?

MS. HAYS: Yeah. The 1999 were options he got in 1999 --

THE COURT: Right.

MR. HAYS: -- but he sold them in January and February.

THE COURT: Right. Right.

MR. HAYS: And in the 2000 -- and different names were used in the different briefing. Those are

options he got in the summer; and by then the price was high enough it made sense to sell immediately and that's what he did.

You know, his argument at trial was not only was there no scheme. It was, also, he didn't like being in the stock market and he got out as soon as it made sense to and that's why he sold as soon as he got the options in the summer. They're already worth something. When he got in the 1999 option the year before they weren't worth anything. They really weren't much until like January and February and that's when he sold them. His theory always stayed the same.

THE COURT: All right. Mr. Patrick, what happened between the first sale and the second sale?

MR. PATRICK: Your Honor, I am actually going to let Mr. Wilson do the talking on this one.

THE COURT: Mr. Wilson.

MR. WILSON: Good morning, Your Honor.

I think the difference between the first sale and the second sale is the difference that the Court pointed out in its ruling several years ago when it first rejected Mr. Shelby's claim, and that is that there was evidence at trial that the Defendant could have made the sale based on factors other than his inside information. In fact, in the Defendant's motion for judgment of acquittal he admitted that the jury could have found that he did not use material inside information when he made the late -- the mid-2000 and summer 2000 sales, and that was the difference that the Court relied on when it rejected his issue preclusion argument and that was the basis for the

Court of Appeals' ruling. And it's our submission that that ruling, this court's and the Court of Appeals' affirmance of it precludes the Defendant from raising the same arguments that he raised several years ago. In fact, the arguments that he made there are the arguments that the Court has already rejected.

THE COURT: I know. I was waiting to hear something different and I haven't heard anything different. I don't think that the *Yeager* outcome --

What do you think the impact of the Supreme Court's decision in *Yeager* does to Mr. Shelby's case?

MR. WILSON: I think it does absolutely nothing, Your Honor. The issue before the Court in *Yeager* was, really, whether issue preclusion applies at all in this circumstance. The Government's argument was that when you have acquitted counts and hung counts that the inconsistency between those two under the Supreme Court's decision in *United States v. Powell* precludes the application of issue preclusion whatsoever. And, therefore, when you have a situation like you have in this case or you had in Mr. Yeager's case, you simply cannot do an issue preclusion argument. The Supreme Court rejected that argument.

THE COURT: Right.

MR. WILSON: And, therefore, we're done as far as Mr. Yeager is concerned, but it has no effect on Mr. Shelby's case, because neither this court nor the Fifth Circuit used that analysis, the analysis drawn from the Fifth Circuit's decision in *Leach*, in rejecting Shelby's claim. Instead, it made a straightforward analysis under *Ashe v. Swenson*. This is where we

have straightforward analysis under *Ashe v. Swenson* and the later Fifth Circuit cases. The Fifth Circuit made the same analysis and the Supreme Court in *Yeager* reaffirmed that that is the analysis. And, if anything else were necessary, the decision on remand in the *Yeager* case from the Fifth Circuit makes it crystal clear that the Fifth Circuit doesn't think that *Yeager* changed the analysis whatsoever.

MS. HAYS: Your Honor, if I may.

THE COURT: Ms. Hays.

MS. HAYS: In this court's prior opinion your analysis was maybe he used the information the first time and didn't the second. Maybe that's what the jury thought. And, in doing so, the Court was considering what happened that they hung in the January-March sales. We can't look at it that way. And, instead, it's actually the way Shelby briefed it to the Fifth Circuit in the first place. You look at what were the issues at trial, what was the Defendant acquitted of, what issues at trial underlie those acquitted counts and do they underlie the remaining counts. You don't think about, try to guess, try to speculate, why the jury hung on other counts. And that's what the prior decision said, both in this court and above at the Fifth Circuit. And if you go back to the older Fifth Circuit cases, I think you get a more pure *Ashe*-based analysis.

And, as to the *De La Rosa* case, which has been briefed to this court, it was a case over a shooting in a bar fight. A man gunned down someone who murdered his daughter. He accidentally shoots a child at the same time or a child is shot at the same time. The Government chose to take him to trial on a

theory of "transferred intent", chose to take him on the murder-of-a-child trial first and they lost. And the Fifth Circuit upheld a finding on the application of issue preclusion because they never argued that his mental state changed between the shooting of the two victims.

The same thing here. The Government never argued that Rex Shelby's mental state changed over the course of the alleged scheme. They argued it was always the same.

Another case that's instructive out of the Fifth Circuit back in the earlier days before the Circuit itself got off track on this application is the *Leach* case. It was a conspiracy case, a scheme involving a politician. The politician's defense at trial was 'There's no scheme. I have got no idea what you're talking about.' These defendants did the same thing. And all three of them got acquitted on some of their counts, Yeager of conspiracy.

Now, if the Government had gone forth with a more complex theory we wouldn't have an argument, but they didn't. They tried this case on a simple theory.

So, what issues were really put to the jury? We can't speculate what they might have thought of, what they may have come up to rationalize why they acquit on some counts and not others. We can only look at what was argued to them at trial in the opening and closing statements and in the evidence presented.

And in the jury charge, paragraph 11 of the indictment in this case, which this court read to the jury when it charged the case, boiled it down to one

simple scheme, and that's what the Government should be stuck with. They shouldn't get a second bite at the apple because the first theory of the case didn't work.

THE COURT: So, Mr. Wilson, am I allowed now to look, after the Supreme Court's ruling, at the difference between what happened between the early 2000 and the late 2000 sales?

MR. WILSON: Your Honor, you can certainly determine why the jury acquitted -- or analyze why the jury acquitted on the mid-2000 sales, the summer 2000 sales. That's the key to the *Ashe* analysis. The Court is required to make an analysis based on the whole record of why the Court acquitted, and that's what the Court -- we would submit that's what the Court did in its initial opinion.

THE COURT: I know that's what I did in my initial opinion. I am asking: Do you think that I am still permitted to do that now, after the Supreme Court's ruling?

MR. WILSON: You can certainly analyze why the jury reached the verdict it did in acquitting the Defendants. The only thing that the Supreme Court says you cant do, in *Yeager*, is then say, 'Well, because the jury failed to reach a verdict on other counts, that inconsistency prevents me, as the court, from determining what the jury did in the acquitted counts.' That's what *Yeager* says.

But I would submit that the Court did not do that. There is no mention of that analysis in the Court's early opinion, and the Fifth Circuit didn't use that analysis in affirming this court, and we would submit

that's why the Supreme Court didn't take Mr. Shelby's case and did take Mr. Yeager's case.

THE COURT: Yeah. I just thought that Shelby just didn't have as good a case. It made sense to me that the Supreme Court took Yeager's case on cert. and not Shelby's, given the difference in the acquittals of the two defendants. Although I did think that, potentially, there was at least some potential that the Supreme Court's ruling in Yeager could have an impact on Shelby, which is why, you know, we stuck our finger in the page and waited until now to decide what we were going to do going forth with Shelby's case, but, at the end of the day, I just don't really see that it helps Mr. Shelby's case or with respect to the issue of issue preclusion.

Ms. Hays, I am just not with you.

MS. HAYS: Your Honor, the Government had multiple opportunities in the briefing of this case to point this court, the Fifth Circuit or the U.S. Supreme Court to anyplace in the record where they made an argument that Shelby would have had a different reason to sell later than it did earlier, and they never did it because it's not there.

We can't presume -- And this is what the *Yeager* opinion of the Supreme Court put out, limits us to. We can't presume the jury came up with a theory that wasn't put before them at trial. We can't put that conjecture in their minds. And you have to do that, logically, to come to the conclusion that they must have thought he had some other reason to sell in the summer than he did in January, when at trial both sides -- the Government and Shelby -- stuck to the same theory, the Government saying it was a

pump-and-dump scheme, they were all crooks, it was a conspiracy, and Rex Shelby saying there was no conspiracy, 'I sold the stock to get out of the stock market.' And he would have lost money if he had sold any earlier than January or March.

THE COURT: Okay.

MR. WILSON: Your Honor, I would just note that the Court -- both this court and the Fifth Circuit relied directly on Mr. Shelby's testimony where he gave his reasons for the sales during the summer of 2000, and they were not reasons that related to the Government's case, and the Court's ruling and the Fifth Circuit's ruling is that the jury may have accepted the reasons Mr. Shelby himself proffered.

THE COURT: Yeah.

MR. WILSON: That's the difference between the two sets of counts.

MS. HAYS: He gave the same reasons for his January sales.

THE COURT: Okay.

MS. HAYS: He didn't like being with the stock market. He didn't really know much about the stock market. So, he waited for his co-worker and former business partner, Mr. Berberian, to tell him when to sell, and they both sold at the same time to the date.

THE COURT: And the jury believed him with respect to one set of sales and didn't believe --

MS. HAYS: Exactly, Your Honor. They found the facts in his favor and the Government can't go back and relitigate that fact.

THE COURT: No. They found it with respect to one set of sales. Come on, now. Wait a minute. You're trying to have it both ways. You're trying to have it both ways. I mean, they may have completely rejected what he said with respect to those earlier sales.

MS. HAYS: Well, let's go back to what the language in the jury charge of what "knowledge" means and "insider trades". It means the bad inside information the Government said he had was a factor.

THE COURT: Right.

MS. HAYS: Not a big factor, not the majority factor, just "a" factor.

THE COURT: Right.

MS. HAYS: One of many reasons. If it wasn't a factor when he sold in June, how could it have been a factor when sold in January? If that jury charge had been written differently, again, we wouldn't have an argument, but it set a low bar for whether or not the inside information motivated the sales.

THE COURT: And your argument is that they couldn't have rejected his argument with respect to one set of sales and accepted his argument with respect to the other?

MS. HAYS: Right. Because of the way the case was tried. The Government didn't argue there was any difference in his mental state, in his mental intent, and neither did Rex Shelby. Rex Shelby argued that every time he sold he sold because he wanted out of the market.

THE COURT: But what you're saying is that the jury doesn't have a right to make a credibility determination with respect to the Defendant's testimony on that issue?

MS. HAYS: They do and they made it in his favor.

THE COURT: Once. But they rejected it the other time.

MS. HAYS: But, see, Your Honor, there you're considering the hung count and that's what *Yeager* says we can no longer do. We don't know that they rejected it in January because they didn't give us an answer on those counts.

THE COURT: I just don't see that they're the same.

MS. HAYS: Because time went by?

THE COURT: No. No. Now I am talking about the acquittals in *Yeager* and the acquittals in *Shelby*.

MS. HAYS: I misunderstood you.

THE COURT: I'm sorry.

MS. HAYS: Your Honor, in this round of motions Shelby made an argument that had not been made before, and that is that you should look at the acquittals across the Defendants, and that is unusual. You know, frankly, I couldn't find any cases that did that, but I thought about the *Ashe* test. It is to be a logical and practical test. And, again, the way the Government tried this case, where they lumped them in together, did not differentiate in their motivations or their participation in the scheme, but, logically and practically, that's fair game here. I mean, the pattern of acquittals in the three

defendants is pretty scattered. It's hard to make sense of it if you consider the hung counts. If you don't consider the hung counts, it tells us that the jury found a lot of facts in favor of these defendants.

How can the jury have thought there was a scheme at all when they're acquitting Rex of insider trading counts, Yeager of conspiracy and security fraud and -- frankly, I've forgotten what Hirko got acquitted of now. What facts could the jury have thought in the Government's favor with that pattern of acquittals?

MR. WILSON: Your Honor, in the prior briefing the Defendant, Mr. Shelby, specifically argued that we could not look across defendants in assessing collateral estoppel. In Footnote 7 of the Fifth Circuit's decision the Court accepted that argument and said that each Defendant must be looked at separately. We would submit that that is also a binding determination by the Fifth Circuit, that the court may only look at the collateral estoppel analysis for each defendant, and I think it would be particularly inappropriate for this court to take another analysis in light of Mr. Shelby's vehement argument before that the Government erred in making that argument.

MS. HAYS: Actually, Your Honor, Footnote 7 wasn't that broad. Footnote 7 was talking about the difference in pattern of acquittals and one of the defendants, not about the evidence and arguments made at trial.

THE COURT: Well, I don't think the difference helps. That's what I am -- you know, I don't think

that it helps Mr. Shelby's arguments at all. I don't see it.

I think I am going to go with what I thought when I got in here, which is that I don't think that the motion to dismiss on grounds of issue preclusion for Mr. Shelby should be granted. I don't think that the Supreme Court decision or the Fifth Circuit's decision in *Yeager* changes my view on that at this point. So, the motion to dismiss is denied.

MS. HAYS: Your Honor, we also need a ruling on whether or not Mr. Shelby's motion was frivolous.

MR. WILSON: Your Honor, may I be heard briefly on that?

THE COURT: Sure.

MR. WILSON: The Fifth Circuit's law as specifically noted in the *Angleton* case, which is from this district court, the Court stated that if an issue preclusion or collateral estoppel claim is foreclosed by, quote, binding precedent, unquote, then it's considered frivolous.

THE COURT: Yeah. I don't think I can go there on that one with you, I'm sorry, because this is going back and forth. I'm not going to say that I think that -- Because which binding precedent are you talking about now?

MR. WILSON: I am talking about the Fifth Circuit's decision in *Yeager*, Your Honor, which is binding on this court and specifically beside the issue that Mr. Shelby is raising today.

THE COURT: Which Fifth Circuit decision? The one that they just made on October 19th?

MR. WILSON: Well, both of them, actually, Your Honor.

THE COURT: I mean, they made one decision before it went to the Supreme Court and another decision when they came back. Which one is the binding decision? Because this motion was filed in between the two.

MR. WILSON: Right. So, the one at 521 F.3d 367, the one that went to the Supreme Court, remains binding on Mr. Shelby. The Supreme Court denied cert. as to him; and, so, it is binding precedent both for the Fifth Circuit and for this court and should foreclose --

THE COURT: Yeah. But they could have taken cert. on either one of these cases.

MR. WILSON: But they didn't. They took Mr. Yeager's case.

THE COURT: I don't think it was frivolous. I just can't make any ruling based on the way this case has gone. I just cannot make that ruling. I really can't. I understand that it didn't go their way with the Supreme Court. The Supreme Court didn't take cert. on this case. They might have. I didn't know which way it would go. Neither did anybody. I don't think that it was frivolous, given the fact that Mr. Yeager was pursuing his, for Mr. Shelby to go ahead and pursue trying to get cert. and filing this motion in the interim while we were waiting for the Supreme Court to make a decision in the *Yeager* case.

I mean, I think that, you know, we plowed some new ground. So, I don't think that -- I just don't

think it would be fair to say that it was frivolous for them to pursue this issue and to pursue this motion.

So, the motion is denied, but the Court does not find that the Defendant's decision to pursue the motion to dismiss on the grounds of issue preclusion was frivolous based on the previous decision of the Fifth Circuit.

So, what are we going to do, then, Ms. Hays?

MS. HAYS: Well, with that finding, we're up on interlocutory appeal again.

MR. WILSON: Your Honor, may I make a suggestion?

THE COURT: Sure.

MR. WILSON: The Court is not divest of jurisdiction to set a trial date until the notice of appeal is filed.

THE COURT: I know, but what's the point of that?

MR. WILSON: Well, I intend to file a motion to expedite the appeal and, also, to dismiss the appeal, because we still maintain our decision that it is frivolous and, therefore, the case may be back before the Court relatively quickly.

THE COURT: I mean, I can get you to trial. That's just a nonissue. I mean, it's just a nonissue. If it comes back quickly I will get you a trial date. It's not like it will be all filled up and then no space for you for three years or anything like that. Esthela will find someplace.

Right, Esthela?

If it comes back next week y'all can go to trial in January. Are you ready to go?

MR. WILSON: We'll be ready.

THE COURT: There you go. I mean, I just don't really see the point right now of setting it. When are you going to get your appeal filed?

MS. HAYS: We need an order from the Court to appeal.

THE COURT: Okay. I will --

MS. HAYS: And as fast as I can get it in hand

THE COURT: Okay. I will do that for you so you can get it done right away and as fast as you can. I will get you your order out this week, then. Are you going to file next week as soon as you get back?

MR. HAYS: Yeah. We can perfect appeal next week and get it going.

THE COURT: Then, we'll see where we go from there.

MS. HAYS: Thank you, Your Honor.

THE COURT: Thank you, lawyers.

MR. TOMKO: Thank you, Your Honor.

THE COURT: Yes. Thank you, guys.

COURT REPORTER'S CERTIFICATE

I, BRUCE SLAVIN, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter, to the best of my ability.

s/Bruce Slavin

BRUCE SLAVIN, RPR, CM

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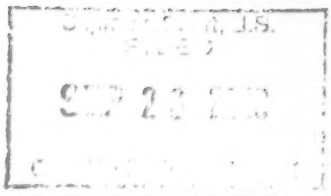

No. 09-1554

In the Supreme Court of the United States

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly dismissed petitioner's interlocutory appeal of the district court's denial of his motion to dismiss pending charges based on issue preclusion under the Double Jeopardy Clause.

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In the Supreme Court of the United States

No. 09-1554

REX SHELBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-17a) is reported at 604 F.3d 881. A prior opinion of the court of appeals is reported at 521 F.3d 367.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2010. A petition for rehearing was denied on May 17, 2010 (Pet. App. 19a-20a). The petition for a writ of certiorari was filed on June 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In November 2005, a grand jury sitting in the Southern District of Texas returned a seventh superseding indictment charging petitioner with conspiracy to commit wire fraud and securities fraud, in violation of

18 U.S.C. 371; securities fraud, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5; and four counts of insider trading, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5. Petitioner moved to dismiss the bulk of those charges based on the collateral estoppel component of the Double Jeopardy Clause. The district court denied the motion, and the court of appeals affirmed. This Court denied petitioner's petition for a writ of certiorari, but the Court granted a petition filed by one of his co-defendants. In July 2009, following this Court's decision in the co-defendant's case, petitioner again moved to dismiss the charges against him under the Double Jeopardy Clause. The district court denied the motion. Petitioner appealed, and the government moved to dismiss the appeal. The court of appeals granted the government's motion, dismissed the appeal, and remanded the case for trial. Pet. App. 2a-17a.

1. Petitioner, along with co-defendants F. Scott Yeager and Joseph Hirko, were executives at Enron Broadband Services (EBS), a unit of Enron Corporation engaged in the telecommunications business. In late 1998, EBS sought to develop an advanced "intelligent" communications network and the software necessary to run the network. According to the charges against them, petitioner and his co-defendants purposely sought to deceive the public and to drive up the price of Enron stock by making false statements about EBS's progress and financial condition while at the same time enriching themselves by selling millions of dollars of Enron stock. Pet App. 3a; 521 F.3d at 370.

2. In November 2004, a fifth superseding indictment charged petitioner with conspiracy to commit wire fraud and securities fraud, in violation of 18 U.S.C. 371; securi-

ties fraud, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5; four counts of wire fraud, in violation of 18 U.S.C. 1343 (Supp. II 2002); eight counts of insider trading, in violation of 15 U.S.C. 78j(b), 15 U.S.C. 78ff, and 17 C.F.R. 240.10b-5; and six counts of money laundering, in violation of 18 U.S.C. 1957 (2000). Yeager and Hirko were also charged in the indictment with conspiracy, securities fraud, wire fraud, insider trading, and money laundering. Pet. App. 3a; 521 F.3d at 369-370 & n.2.

After a trial in the United States District Court for the Southern District of Texas, the jury found petitioner not guilty on four of the insider trading counts but failed to reach a verdict on the four other counts. The four insider trading counts on which the jury acquitted related to sales of Enron stock made in the summer of 2000 while the four insider trading counts on which the jury did not reach a verdict related to sales of Enron stock made between January and March 2000. The jury was also unable to reach verdicts on the other counts charged against petitioner. The jury also returned mixed verdicts against Yeager and Hirko, finding them not guilty on some counts but deadlocking on other counts. The district court granted judgments of acquittal for petitioner on the wire fraud and money laundering counts. The court declared a mistrial on the other counts. Pet. App. 3a-4a; 521 F.3d at 370, 372, 375, 376-377.

3. Thereafter, in November 2005, the grand jury returned the seventh superseding indictment, which essentially deleted the counts on which petitioner was acquitted and re-alleged the counts on which the jury had deadlocked. The first two counts of the seventh superseding indictment, which charged petitioner with con-

spiracy to commit wire and securities fraud as well as securities fraud, rested on essentially the same facts as the counts of the fifth superseding indictment charging petitioner with those offenses. The seventh superseding indictment also re-alleged the four insider trading counts from the fifth superseding indictment on which the jury had deadlocked. Pet. App. 3a-4a; 521 F.3d at 370.

The seventh superseding indictment also charged Hirko with most of the counts against him in the fifth superseding indictment on which the jury had been unable to reach verdicts. An eighth superseding indictment charged Yeager with some, but not all, of the counts against him in the fifth superseding indictment on which the jury had deadlocked. Pet. App. 3a; 521 F.3d at 370.

4. Petitioner moved to dismiss the securities fraud count and the four insider trading counts based on the collateral estoppel component of the Double Jeopardy Clause. He argued that the government was collaterally estopped from further prosecution of those counts because facts essential to conviction on those counts had been resolved in his favor by the jury's acquittals at the prior trial. Specifically, petitioner argued that the securities fraud count and the four insider trading counts were barred by collateral estoppel because the jury at the prior trial had necessarily decided that he did not act with the requisite intent to defraud when it found him not guilty on the other four insider trading counts. Pet. App. 4a; 521 F.3d at 370.

The district court denied petitioner's motion to dismiss. 447 F. Supp. 2d 750. The court found that it could not, "in all practicality, determine what particular issue the jury necessarily decided in acquitting [petitioner] of

four counts of insider trading." *Id.* at 761. The court explained that "the record contain[ed] no clear indication" that the jury's acquittals on the insider trading counts at the prior trial were, as petitioner claimed, "based on a finding that [he] lacked knowledge or an intent to defraud." *Ibid.* "Rather," the court explained, "the jury could have found that the government failed to prove beyond a reasonable doubt that [petitioner] actually used material non-public information that he had in his possession at the time that he made those trades, or that the government failed to establish that [he] employed or devised a scheme to defraud during that time period." *Ibid.* The court observed that the government's evidence that petitioner had acquired material, nonpublic information when he made the stock sales was stronger for the counts on which the jury had hung than for the counts on which it had acquitted. *Id.* at 761-762.

The district court also denied Yeager's and Hirko's motions to the dismiss their indictments on collateral estoppel grounds. See *United States* v. *Yeager*, 446 F. Supp. 2d 719 (S.D. Tex. 2006); *United States* v. *Hirko*, 447 F. Supp. 2d 734 (S.D. Tex. 2006).

5. The court of appeals affirmed. The court held that the acquittals at the prior trial did not collaterally estop the government from retrying any of the defendants on any of the counts on which the jury was unable to reach verdicts, although the court rejected the claims of each defendant for different reasons. *Yeager*, 521 F.3d 367.

a. The court of appeals concluded petitioner had failed to show that the jury, in acquitting him on four insider trading counts, necessarily made a factual determination that would bar a retrial on the other four insider trading counts and the securities fraud count. 521

F.3d at 372-375. The court observed that the four insider trading acquittals at the prior trial involved sales of Enron stock during the summer of 2000, while the four insider trading counts on which the jury hung involved sales between January and March 2000. *Id.* at 372. After an "extensive" examination of the record, *ibid.*, the court found that the acquittals could have been based on the jury's determination that petitioner "did not 'use' undisclosed, material information when he made the sales" during the summer of 2000 but instead made those sales because of discomfort with the stock market. *Ibid.* That determination, the court explained, would not bar a retrial on the insider trading sales between January and March, because it would not preclude a finding that petitioner made *those* trades because he possessed insider information. *Id.* at 373. The court also concluded that the four insider trading acquittals did not bar a retrial on the securities fraud count, because "'[u]sing' insider information in making trades in not an element of securities fraud." *Id.* at 374.

b. The court of appeals concluded that Hirko had failed to show that the jury's finding that he was not guilty of the money laundering counts and two insider trading counts necessarily rested on a jury determination that he was not guilty of the securities and wire fraud counts and the five other insider trading counts. 521 F.3d at 375-376. The court reasoned that, based on the jury instructions, the jury could have acquitted Hirko on the money laundering counts because it was unable to decide whether the government had proved that he had committed securities fraud, wire fraud, and insider trading. *Id.* at 376.

c. Finally, the court of appeals concluded that Yeager had failed to show that the jury, in acquitting him on

the conspiracy, securities fraud, and four wire fraud counts, necessarily made a factual determination that would bar a retrial on five insider trading counts and eight money laundering counts. 521 F.3d at 376-380. Based on its review of the record, the court initially concluded that "the jury could have acquitted Yeager of securities fraud for two reasons: (1) there were no material misrepresentations or omissions made at the [2000 annual analyst] conference; or (2) Yeager did not knowingly make misrepresentations or omissions because he believed the presentations were truthful." *Id.* at 378. "Under either rationale," the court reasoned, "the jury must have found when it acquitted Yeager that Yeager himself did not have any insider information that contradicted what was presented to the public." *Ibid.* The court observed that, in considering the acquittals by themselves, the jury "seemingly made a finding that precludes the Government from now prosecuting him on insider trading and money laundering." *Ibid.*

The court concluded, however, that its precedents required it also to consider the hung counts, along with the acquitted counts, in examining what the jury determined. 521 F.3d at 378-379. The court observed that "if Yeager is correct that the jury found that he did not have insider information, then the jury, acting rationally, would have acquitted him of insider trading and money laundering." *Id.* at 379. Because it was "impossible" to determine why the jury instead hung on those counts, the court concluded that collateral estoppel did not bar a retrial. *Ibid.* The court went on to note that it rejected the government's argument, based on *United States* v. *Powell*, 469 U.S. 57 (1984), that collateral estoppel never applied when a jury acquitted on some

counts but hung on other counts at the same trial. 521 F.3d at 380-381.

6. a. Yeager filed a petition for a writ of certiorari, which this Court granted. *Yeager* v. *United States*, 129 S. Ct. 593 (2008). The Court subsequently held in *Yeager* v. *United States*, 129 S. Ct. 2360 (2009), that the court of appeals had erred in its collateral estoppel analysis by considering the hung counts, along with the acquittals, in determining what issues the jury necessarily decided at Yeager's first trial. *Id.* at 2367-2368. Noting that "the more descriptive term 'issue preclusion' is often used in lieu of 'collateral estoppel,'" *id.* at 2367 n.4 (citation omitted), the Court held that "consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 2368. "To identify what a jury necessarily determined at trial," the Court explained, "courts should scrutinize a jury's decisions, not its failures to decide." *Ibid.* The Court reversed the judgment against Yeager and remanded for further proceedings. *Id.* at 2369.[1]

b. Hirko filed a petition for a writ of certiorari at the same time as Yeager. In its brief in opposition, the government conceded that, although the court of appeals

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[1] The Court declined to consider the government's alternative argument that Yeager had not shown that the acquittals alone necessarily resolved in his favor an issue of ultimate fact that the government was required to prove in order to convict him of insider trading and money laundering charges. *Yeager*, 129 S. Ct. at 2370. Instead, the court stated that the court of appeals could, if it so chose, address that argument on remand. *Ibid.* On remand, the court of appeals declined to revisit its prior factual analysis that the acquittals, without consideration of the hung counts, precluded prosecution of Yeager on the insider trading counts and money laundering counts. The court remanded to the district court with instructions to enter judgments of acquittal for Yeager on all counts of the eighth superseding indictment. *United States* v. *Yeager*, 334 Fed. Appx. 707, 709 (5th Cir. 2009).

did not explicitly state that it was considering the hung counts in deciding what facts the jury necessarily found in acquitting Hirko, the court's opinion was most reasonably read to have done so. See Br. in Opp. at 14-15 n.5, *Hirko* v. *United States*, *Shelby* v. *United States*, *Yeager* v. *United States*, Nos. 08-40, 08-58 and 08-67 (Br. in Opp.). This Court held Hirko's petition for a writ of certiorari pending its decision in *Yeager* and then granted the petition, vacated the judgment, and remanded the case for further consideration in light of that decision. *Hirko* v. *United States*, 129 S. Ct. 2858 (2009).[2]

c. Petitioner also filed a petition for a writ of certiorari at the same time as Yeager. In its brief in opposition, the government noted that, contrary to petitioner's contention, "the court of appeals did not apply the same analysis in rejecting his collateral estoppel claim," but rejected that claim without relying on the hung counts. See Br. in Opp. at 15 n.5. This Court denied petitioner's petition for a writ of certiorari three days after the Court granted Yeager's petition. *Shelby* v. *United States*, 129 S. Ct. 595 (2008). The Court subsequently denied petitioner's request for rehearing. *Shelby* v. *United States*, 129 S. Ct. 977 (2009).

7. Following this Court's decision in *Yeager*, petitioner filed a new motion to dismiss on double jeopardy grounds. He argued that *Yeager* had clarified the law regarding issue preclusion analysis, justifying reevalua-

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[2] In the interim between the filing of his petition for a writ of certiorari and this Court's decision in *Yeager*, Hirko pleaded guilty to one wire fraud count in the seventh superseding indictment. On remand from this Court, the court of appeals granted the parties' joint motion to reinstate the judgment and remanded the case to the district court to allow Hirko's sentencing to proceed.

tion of his double jeopardy claims and dismissal of all of the charges against him. Pet. App. 8a-9a.

The district court denied the motion. Pet. App. 41a-43a. The court concluded that "the Supreme Court's decision in Mr. Yeager's case [does not] help Mr. Shelby with respect to the motion to dismiss on grounds of issue preclusion." *Id.* at 25a. The court declined, however, to find that the motion was frivolous. *Id.* at 43a.

8. Petitioner filed an interlocutory appeal, which the government moved to dismiss. The court of appeals dismissed the appeal and remanded the case for trial. Pet. App. 2a-17a.

Relying on *Richardson* v. *United States*, 468 U.S. 317 (1984), the court of appeals ruled, as a preliminary matter, that "a colorable, non-frivolous claim is a prerequisite to our jurisdiction under 28 U.S.C. § 1291 to hear a pretrial double jeopardy appeal." Pet. App. 11a. The court of appeals then concluded that this Court's intervening decision in *Yeager* did not raise "a colorable issue" as to the correctness of the court of appeals' prior decision rejecting petitioner's double jeopardy claim. *Ibid.*

First, the court of appeals rejected petitioner's argument that *Yeager* changed the law governing issue preclusion under the Double Jeopardy Clause by imposing a new requirement that, in determining what the jury necessarily decided, a court must restrict its analysis to the "points in controversy" at the former trial. Pet. App. 11a-14a. The court concluded that *Yeager* did not impose any such requirement but "reached only the 'narrow legal question' of whether a court may consider the effect of hung counts in evaluating what the jury necessarily determined." *Id.* at 13a (quoting *Yeager*, 129 S. Ct. at 2370). The court of appeals noted that this Court

stated in *Yeager* that the inquiry into what the jury had decided could take into account not just "the points in controversy" in the former trial but also "the testimony given by the parties" and "the questions submitted to the jury for their consideration." *Ibid.* (quoting *Yeager*, 129 S. Ct. at 2368). The court of appeals observed that, when rejecting petitioner's initial motion to dismiss on double jeopardy grounds, it and the district court had considered "precisely" those factors in determining what the jury had decided. *Ibid.*

Second, the court of appeals found "no merit" in petitioner's argument that it and the district court had also considered the hung counts in determining what the jury had decided. Pet. App. 14a-15a. The court of appeals noted that its conclusions and the district court's conclusions "as to the * * * acquitted counts [did] not depend on any reference to the * * * hung counts." *Id.* at 14a. Instead, the court of appeals explained, those conclusions turned on the evidence presented by the government and petitioner's own testimony. *Id.* at 15a.

The court concluded that petitioner had "failed to cite any intervening change or correction in the law effected by *Yeager*[ ] that has relevance to his double jeopardy claim, which a panel of this court has already considered and squarely rejected." Pet. App. 15a-16a. On the contrary, the court noted, petitioner's invocation of *Yeager* "appear[ed] largely to be pretext for revisiting the reasoning and outcome of [the] prior panel decision." *Id.* at 16a. Because petitioner had "not raised a colorable claim," the court ruled that it was "without jurisdiction to consider his appeal from the district court's denial of his motion." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-15) that this Court's decision in *Yeager* v. *United States*, 129 S. Ct. 2360 (2009), constituted an intervening change in the law that required the district court and the court of appeals to reconsider their previous rejections of his issue preclusion claim. Petitioner also contends (Pet. 16-21) that court of appeals erred in ruling that it lacked jurisdiction to consider his pretrial double jeopardy appeal because his argument based on *Yeager* was not colorable. Those contentions lack merit and do not warrant this Court's review.

1. Petitioner's contention that he is entitled to reconsideration of his issue preclusion claim rests on the premise that *Yeager* changed the standard for evaluating such claims and held that a court may consider only "what was actively contested" when determining what the jury necessarily decided at the former trial. Pet. 11. As the court of appeals correctly concluded, that premise is mistaken. *Yeager* addressed a "narrow legal question," 129 S. Ct. at 2370, holding only that "consideration of hung counts has no place in the issue-preclusion analysis." *Id.* at 2368. Contrary to petitioner's claim, *Yeager* did not alter the well-settled standard for evaluating issue preclusion claims set forth in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), which the Court in *Yeager* viewed as "controlling." 129 S. Ct. at 2367. "To decipher what a jury has necessarily decided," the Court explained in *Yeager*, "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Ibid.* (quoting *Ashe*, 397

U.S. at 444). Thus, the Court in *Yeager* did not limit the inquiry regarding what the jury decided to matters "actively contested at trial." Pet. 11. Instead, the Court reaffirmed its holding in *Ashe* that the inquiry encompasses the entire "record of [the] prior proceeding," and merely decided that "[a] hung count is not a 'relevant' part of the 'record of [the] prior proceeding.'" *Yeager*, 129 S. Ct. at 2367 (quoting *Ashe*, 397 U.S. at 444 (second pair of brackets in original)).

There is no merit in petitioner's claim (Pet. 11-12) that the court of appeals applied a materially different test when it rejected his issue preclusion claim in his prior appeal. In the prior appeal, the court of appeals applied the standard drawn from *Ashe* and circuit precedent, 521 F.3d at 371, engaging in "an extensive examination of the record." *Id.* at 372. Although the court considered hung counts in evaluating Yeager's issue preclusion claim, *id.* at 378-380, the court found no need to consider hung counts in evaluating petitioner's claim. *Id.* at 372-373. Rather, the court rejected petitioner's claim that the jury, in acquitting him on four insider trading counts, must have found that he did not participate in the fraudulent scheme or act with the requisite intent to defraud, because the record showed that "[t]he jury could have found that [petitioner] did not use insider information when he conducted the trades that underlie [the counts on which he was acquitted]." *Id.* at 373; see 447 F. Supp. 2d at 761 (district court noting that "the record indicates that [petitioner] hotly disputed several issues at trial, including the intent to defraud, scheme to defraud, and use elements of the offense"). In other words, the court of appeals simply concluded, based on its review of "the record of [the] prior proceeding," that "a rational jury could have grounded its ver-

dict upon an issue other than that which the defendant seeks to foreclose from consideration." *Yeager*, 129 S. Ct. at 2367 (quoting *Ashe*, 397 U.S. at 444).

Accordingly, the court of appeals correctly concluded that *Yeager* has no bearing on petitioner's issue preclusion claim because the court did not rely on hung counts when it rejected the claim the first time. Pet. App. 14a-15a. And the court therefore correctly determined that petitioner's renewed issue preclusion claim was "frivolous." *Id.* at 11a.

As the court of appeals noted, petitioner's invocation of *Yeager* to support his renewed issue preclusion claim appears "largely to be pretext for revisiting the reasoning and outcome of [the] prior panel decision." Pet. App. 16a; see, *e.g.*, Pet. 14 (arguing that "[t]he only 'realistic' explanation for the acquittals is that the jury agreed that the Defendants were not participating in a scheme to 'pump and dump' stock based on misrepresentations about the functionality of the software"). As petitioner acknowledges (Pet. 9), however, this Court is not a court of general error correction. Petitioner's fact-bound challenge to the court of appeals' reading of the record of the prior proceeding is thus no more worthy of this Court's review now than it was when this Court denied petitioner's initial petition for a writ of certiorari. See *Shelby* v. *United States*, 129 S. Ct. 595 (2008).

2. Contrary to petitioner's contention (Pet. 16-21) the court of appeals also correctly held that it lacked jurisdiction to consider his pretrial double jeopardy appeal on the merits. In *Abney* v. *United States*, 431 U.S. 651, 662 (1977), this Court held that the denial of the defendant's pretrial motion to dismiss on double jeopardy grounds was immediately appealable as a collateral order under 28 U.S.C. 1291. The Court observed that the

Double Jeopardy Clause protects the right not to be "twice put to trial for the same offense," *Abney*, 431 U.S. at 657, 661, and that right "would be lost if the accused were forced to 'run the gaunlet' a second time before an appeal could be taken." *Id.* at 662. Shortly thereafter, in *United States* v. *MacDonald*, 435 U.S. 850 (1978), the Court observed that an appealable double jeopardy claim "requires at least a colorable showing that the defendant once before has been in jeopardy of federal conviction on the same or a related offense." *Id.* at 862.

Subsequently, in *Richardson* v. *United States*, 468 U.S. 317 (1984), the Court elaborated on its observation in *MacDonald*, explaining that "the appealability of a double jeopardy claim depends upon its being at least 'colorable.'" *id.* at 322 (quoting *MacDonald*, 435 U.S. at 862). The Court explained in *Richardson* that "[a] colorable claim, of course, presupposes that there is some possible validity to a claim." *Id.* at 326 n.6. When "no set of facts will support the assertion of a claim of double jeopardy," the Court noted, the claim is not "colorable." *Ibid.*

Read together, *Richardson* and *MacDonald* establish that whether a double jeopardy claim is interlocutorily appealable turns on whether the claim is colorable. And a showing of former jeopardy is a necessary, but not sufficient, condition for a claim to be colorable. *MacDonald*, 435 U.S. at 862. More generally, the claim must have some "possible validity." *Richardson*, 468 U.S. at 326 n.6.

The court of appeals correctly concluded that it lacked jurisdiction to consider petitioner's appeal from the denial of his second motion to dismiss because his issue preclusion claim was not "colorable." See Pet. App. 15a-16a. The issue preclusion claim raised by peti-

tioner in the district court following this Court's denial of his petition for a writ of certiorari was precisely the same claim that the court of appeals, after an extensive review of the record, had squarely rejected in *Yeager*, 521 F.3d at 372-375, without reference to the hung counts. For the reasons discussed above, the court of appeals correctly concluded that this Court's decision in *Yeager* did not change the law in any way that was relevant to petitioner's issue preclusion claim. Pet. App. 15a-16a. Thus, there was no "possible validity" to petitioner's claim, and the court of appeals correctly ruled that it lacked jurisdiction to consider petitioner's appeal from the district court's denial of his second motion to dismiss on double jeopardy grounds. *Id.* at 16a.

Petitioner argues (Pet. 18-21) that the court of appeals misread the word "colorable" to require that a claim have some possible merit; instead, petitioner contends, a claim is "colorable," and a defendant may take an interlocutory appeal, whenever the defendant can establish "an actual attachment of prior jeopardy." Pet. 18. The court of appeals, however, correctly based its interpretation of the requirement that a claim be colorable on this Court's statement in *Richardson* that a colorable claim "presupposes that there is some possible validity to a claim." Pet. App. 9a (quoting *Richardson*, 468 U.S. at 326 n.6). Petitioner simply ignores that statement in *Richardson*. Moreover, after rejecting the defendant's double jeopardy claim on the merits, the Court in *Richardson* explained that "[s]ince no set of facts will support the assertion of a claim of double jeopardy like petitioner's in the future, there is no possibility that a defendant's double jeopardy rights will be violated by a new trial, and there is little need to interpose the delay of appellate review before a second trial can

begin." 468 U.S. at 326 n.6. Thus, *Richardson* refutes petitioner's contention that a double jeopardy claim is colorable whenever the defendant "has been in jeopardy" before. Pet. 20.[3]

None of the decisions of this Court cited by petitioner (Pet. 18-19) support his contention that the court of appeals erred in holding that a double jeopardy claim is immediately appealable only if the claim has some possible validity. *MacDonald* did not directly concern the appealability of a double jeopardy claim. Rather, the Court held in *MacDonald* that a court of appeals lacked jurisdiction to entertain a defendant's interlocutory appeal from the denial of a pretrial motion to dismiss an indictment for a violation of the Sixth Amendment right to a speedy trial. 435 U.S. at 857. As discussed above, to the extent *MacDonald* sheds light on the immediate appealability of double jeopardy claims, it supports the court of appeals' holding that a defendant may take an interlocutory appeal only if his claim is colorable. See p. 15, *supra*.

The other decisions of this Court on which petitioner relies also did not involve the appealability of double jeopardy claims. In *Arthur Anderson LLP* v. *Carlisle*, 129 S. Ct. 1896, 1900-1901 (2009), the Court held, based on the plain language of the Federal Arbitration Act,

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[3] Indeed, petitioner himself elsewhere appears to acknowledge that the existence of prior jeopardy is not sufficient to establish that a double jeopardy claim is colorable. See Pet. 21 (suggesting that the colorability of a double jeopardy claim depends upon whether "there has been 'a jeopardy terminating event'" (quoting *United States* v. *Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005)). A claim is colorable only if the defendant can make plausible showings of both prior jeopardy and a jeopardy terminating event because both are necessary—although not sufficient—to satisfy the requirement that the claim have "some possible validity." *Richardson*, 468 U.S. at 326 n.6.

Ch. 213, 413 Stat. 883, that an appellate court has jurisdiction over an appeal from an order refusing a stay of any action referable to arbitration under the Act. In *Behrens* v. *Pelletier*, 516 U.S. 299, 306-307 (1996), the Court held that a defendant's immediate appeal of an unfavorable qualified immunity ruling on a motion to dismiss in a civil *Bivens* action did not deprive the court of appeals of jurisdiction over a second appeal based on qualified immunity following the denial of summary judgment. In *Johnson* v. *Jones*, 515 U.S. 304, 319-320 (1995), the Court held that a defendant who is entitled to invoke a qualified immunity defense in a civil action may not appeal a district court's summary judgment order insofar as the order determines whether or not the pretrial record sets forth a "genuine" issue of material fact for trial. And in *Digital Equipment Corp.* v. *Destktop Direct, Inc.*, 511 U.S. 863, 865 (1994), the Court held that an order in a civil case vacating a dismissal predicated on the parties' settlement agreement was not an appealable collateral order.

Petitioner also errs in contending (Pet. 20-21) that the decision below conflicts with decisions of other courts of appeals. As petitioner notes (Pet. 20), the Tenth Circuit in *United States* v. *Wood*, 950 F.2d 638, 642 (1991) (per curiam), distinguished between its "jurisdictional authority to hear an appeal" and its "supervisory power summarily to dismiss frivolous appeals," stating that "[t]he summary determination of whether a defendant has raised a colorable claim [was] not necessary to [its] jurisdiction." As the court of appeals noted (Pet. App. 10a), however, it is difficult to square the Tenth Circuit's statement in *Wood* with this Court's statement in *Richardson* that "the appealability of a double jeopardy claim depends upon its being at least

'colorable.'" 468 U.S. at 322. Moreover, the Tenth Circuit's statement in *Wood* was not necessary to the court's decision because the court held that the defendant's claims were colorable in any event. See 950 F.2d at 642. And, in a subsequent case, the Tenth Circuit made clear that it considers colorability to be a jurisdictional requirement, dismissing a defendant's appeal on a double jeopardy claim after finding that the claim was not colorable. *United States* v. *McAleer*, 138 F.3d 852, 857, cert. denied, 525 U.S. 854 (1998).

As the court of appeals noted (Pet. App. 10a-11a), other courts of appeals have also concluded that a colorable claim is a prerequisite to jurisdiction. See *United States* v. *Bhatia*, 545 F.3d 757, 758 (9th Cir. 2008) ("Because his claims of res judicata and collateral estoppel are not colorable, we dismiss this interlocutory appeal for lack of jurisdiction."), cert. denied, 130 S. Ct. 127 (2009); *United States* v. *Bobo*, 419 F.3d 1264, 1267 (11th Cir. 2005) ("[O]nly 'colorable' double jeopardy claims can be reviewed prior to final judgment."); *United States* v. *Hickey*, 367 F.3d 888, 891 (9th Cir. 2004) ("Both the Supreme Court and this court, however, have held that we have interlocutory appellate jurisdiction to reach the merits only of 'colorable' double jeopardy claims."), amended 400 F.3d 658 (9th Cir.), cert. denied, 546 U.S. 872 (2005); *United States* v. *Abboud*, 273 F.3d 763, 769 (8th Cir. 2001) ("The Abbouds have not raised colorable claims of double jeopardy * * * . For these reasons we lack jurisdiction over these interlocutory appeals, and they are dismissed."); *United States* v. *Andrews*, 146 F.3d 933, 937 (D.C. Cir. 1998) ("[T]he Supreme Court held in *Richardson* v. *United States* that a claim of double jeopardy must be at least 'colorable' to confer interlocutory jurisdiction on an appellate court.").

Petitioner incorrectly argues (Pet. 20-21) that those decisions endorse his view that a double jeopardy claim is colorable, and thus immediately appealable, whenever a defendant has been subject to former jeopardy. On the contrary, in *Bobo*, the Eleventh Circuit stated, consistent with the decision below, that "frivolous claims and arguments that have already been squarely decided by precedent do not afford appellate courts jurisdiction to review interlocutory orders." 419 F.3d at 1267 (citing *Richardson*, 468 U.S. at 322). Likewise, in both *Bhatia* and *Hickey*, the Ninth Circuit stated, consistent with the decision below, that the colorability and immediate appealability of a double jeopardy claim turn on whether the claim has "some possible validity." *Bhatia*, 545 F.3d at 759 (citation omitted); *Hickey*, 367 F.3d at 891 (citation omitted). And, although the D.C. Circuit concluded in *Andrews* that a defendant's claim was not colorable because he was never previously in jeopardy, nothing in the decision suggests that the existence of former jeopardy is alone sufficient to render a claim colorable. See 146 F.3d at 937-938. Finally, the Eighth Circuit's statement in *Abboud* that "[a] colorable claim requires a showing of previous jeopardy *and* the threat of repeated jeopardy," 273 F.3d at 766 (emphasis added), refutes, rather than supports, petitioner's contention that a showing of previous jeopardy is alone sufficient. The Eight Circuit's statement is simply a different way of expressing *Richardson*'s requirement that a double jeopardy claim must have some possible validity to qualify as colorable.

In any event, this Court's review would not be warranted even if petitioner were correct that the court of appeals erred in holding that it lacked jurisdiction to review his double jeopardy claim because that claim is

frivolous. The court of appeals correctly concluded that petitioner's claim lacks merit, so he would not be entitled to any relief even assuming that the court erroneously labeled its decision a dismissal for lack of jurisdiction rather than a ruling on the merits. Because petitioner would not be entitled to any relief even if this Court resolved the jurisdictional issue in his favor, this case is not an appropriate vehicle to consider that issue.

Finally, given the unique context in which they arise, the issues presented by petitioner are not of broad or recurring importance. Based on an intervening decision by this Court involving a co-defendant, petitioner is seeking to take a second interlocutory appeal after the court of appeals squarely and correctly rejected his issue preclusion claim in his first interlocutory appeal. Because those unusual circumstances are unlikely to recur in a future case, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General

LANNY A. BREUER
Assistant Attorney General

JOSEPH C. WYDERKO
Attorney

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IN THE

Supreme Court of the United States

REX SHELBY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF THE PETITIONER

SUSAN HAYS*
GEISLER HAYS, LLP
2911 TURTLE CREEK BLVD.
SUITE 940
DALLAS, TEXAS 75219
(214) 367-6040
shays@ghlawllp.com
**Counsel of Record*

DAVID HORAN
ANDREW WIRMANI
JONES DAY
2727 NORTH HARWOOD ST.
DALLAS, TEXAS 75201
(214) 969-5124
dlhoran@jonesday.com
aowirmani@jonesday.com

EDWIN J. TOMKO
JASON M. ROSS
CURRAN TOMKO TARSKI, LLP
2001 BRYAN ST., SUITE 2000
DALLAS, TEXAS 75201
(214) 270-1400
etomko@cttlegal.com
jross@cttlegal.com

COUNSEL FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Government contends that Shelby's Petition presents only an unusual circumstance and no pervasive legal error. However, the Government's own insistence that this Court granted and decided *United States v. Yeager* — yet changed no law — and that *Richardson v. United States* means something far broader than its plain language and scope of analysis provide, disseminates the error of the decision below to innumerable other defendants, and thus threatens the constitutional protections of the Double Jeopardy Clause and the procedural protections of the *Cohen* doctrine for all.[1]

I. Because the Fifth Circuit, the District Court, and the Government All Insist That *United States v. Yeager* Did Not Alter the Fifth Circuit's Prior Formulation of *Ashe*, This Court Should Grant Review.

A. *Yeager* Undoubtedly Altered the Fifth Circuit's Issue Preclusion Methodology.

The Fifth Circuit's prior mis-formulation of the issue preclusion test in *Ashe v. Swenson*, 397 U.S. 436 (1970), was worthy of this Court granting a writ of certiorari. *See United States v. Yeager*, 129 S. Ct. 2360 (2009). The lower court's taciturn stance that *Yeager* posed no change to its reversed opinion's methodology warrants review. The Fifth Circuit

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[1] *Richardson v. United States*, 468 U.S. 317 (1984); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

directly and more broadly compared the jury's "decision" on the hung counts with its verdict on the answered counts, finding itself unable to reconcile the two in F. Scott Yeager's case, but surmising that in Rex Shelby's case the jury must have believed he did not "use" knowledge of the purported far-reaching insider trading conspiracy when he sold stock in the summer, acquitting him on those counts, yet could have "used" such information during sales a few months earlier on the hung counts. *United States v. Yeager*, 521 F.3d 367, 372-73, 372 n.9, 373 n.11 (5th Cir. 2008) ("the timing distinction is obvious and one the jury could have made on its own"); *United States v. Shelby*, 447 F. Supp. 2d 750, 761-62 (S.D. Tex. 2006) ("the jury's acquittal is entirely consistent with the jury's failure to acquit"). In its Opposition, the Government jumps over the question of whether the Fifth Circuit applied *Ashe* incorrectly the first time and insists that this Court should simply move on, claiming there is no carnage to see here.

Shelby asks this Court to enforce the logic of *Ashe* and *Yeager* to a recalcitrant court of appeals by granting his Petition, vacating the Fifth Circuit order, and inculcating this Court's holding to the lower court which refused to render any decision on the merits after *Yeager* under the theory that the decision changed nothing in the Fifth Circuit's prior analysis. *See* 129 S. Ct. at 2368. All parties agree that the analysis should be based in the trial record, but disagree on what the record's boundaries are. By dismissing Shelby's appeal for want of jurisdiction, the Fifth Circuit insists on considering the hung counts by relying on its prior opinion and further insists on conjecture outside the record by surmising

that the jury must have decided that Shelby "used" knowledge of negative inside information when he sold stock in January to March 2000, but did not "use" it during his June and July sales. But on the trial record, no such argument that Shelby's mental state changed over time was ever made to the jury by the prosecution or by the defense. *Cf. United States v. Coughlin*, 610 F.3d 89 (D.C. Cir. 2010) (after *Yeager*, holding both the prosecution and the defense to the arguments made at trial to determine what the jury necessarily decided with a partial verdict of acquittal of earlier-in-time counts). Rather, the three defendants, Yeager, Shelby, and Joseph Hirko, put up a united front, all testifying that the Enron broadband technology worked, that the public was not deceived about the technology's functionality, and that there was no insider trading scheme at all.

The court to which the mandate in *Yeager* was directed persists in comparing acquitted and hung counts, but there is no permissible way to compare them. Both the Fifth Circuit and the district court claim they did not consider the hung counts in Shelby's case, but both explicitly reference those counts in their analysis. App. 5a-6a (quoting 521 F.3d at 373 ("the jury could have differentiated between the two different sets of trades")); App. 24a, 39a; 447 F. Supp. 2d at 761-62. The lower courts apparently believe they used the hung counts in a *permissible* way, but under *Yeager*, there is no permissible way to use or consider hung counts, either directly or indirectly. Rather, as amicus rightly argues, the acquittals should be reviewed as though this were a seriatim prosecution, and the hung counts did not exist at all. TCDLA Br. at 10-11.

When reviewing a partial verdict[2] such as Shelby's, the court should place its hand over the hung counts and review as though they do not exist at all. Otherwise, the court inevitably compares the counts, as the Fifth Circuit did here, speculating, as did the district court unabashed as it was,[3] that the jury must have believed Shelby did not "use" the insider information in the summer but could have in the spring. App. 5a-6a; 521 F.3d at 373, 373 n.11 ("because the jury could have made this timing distinction [between acquitted and hung counts], it did not necessarily make a factual determination that would bar a subsequent prosecution").

Under the Double Jeopardy Clause a jury's acquittal must carry constitutional weight. *Yeager* rightly limits the issue preclusion analysis to the "points in controversy" during the first trial. The Fifth Circuit, unmoored from the actual factual contest as it played out before the jury, answered that the jury "must have" latched onto the meaning of "use." But on the trial record below "use" was not a point in controversy nor even included in the three

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[2] The Government describes the verdict as "mixed." Opp'n at 3. This muddled language clouds the issue. "Mixed" more accurately describes a verdict of both acquittals and convictions. *See United States v. Powell*, 469 U.S. 57 (1984). This verdict is only "partial" as the jury reached some questions and gave a uniform answer to the questions it reached.

[3] "But they [the jury] rejected it [Shelby's credibility] the other time [for the hung counts]." App. 39a. "I think the Supreme Court looked at the hung counts in determining what effect the acquitted counts were." App. 24a.

"essential elements" of insider trading presented to the jury, but a definition buried at the end of the jury instructions. A temporal distinction of "use" was never an issue at trial — "use" appeared only in the sense that the defendants argued there was no scheme, the broadband technology worked, and thus they made no material misrepresentations to the public. That is, Shelby did not "use" the information because there was no negative, inside information to use at all. Thus, the factual determination the jury had to make to determine Shelby did not "use" negative insider information during his sales also squarely underlies the elements of the remaining counts. Had that opinion's logic been applied to the facts in *Ashe*, the court would have surmised that in acquitting the defendant on the robbery of one victim at the poker party, the jury believed him when he said it was a case of mistaken identity, but may not believe him in a subsequent trial for robbing the other victims even though the defendant put up the precise same theory of his defense. *See Ashe*, 397 U.S. 436; *Yeager*, 521 F.3d at 373 n.11 ("[T]he jury could have accepted Shelby's defense for one set of counts and not the other.").

As in *Ashe*, as the prosecution framed its theory of the case, the broadband defendants put a limited number of points into controversy at trial. That the jury acquitted them of multiple counts demonstrates the jury necessarily decided those intertwined factual points in their favor. While the burden remains on the defendant to demonstrate the application of issue preclusion, the courts may not stretch their logical arguments so far as to moor them to points not in controversy during the trial and piece together

support for what the jury "must have" decided by picking a sentence or two from testimony or jury instructions that no party argued was important or worthy of the jury's attention. Instead, the courts are bound by the arguments actually made during trial. *See Ashe*, 397 U.S. at 444; *Coughlin*, 610 F.3d at 100-02. Because the prior Fifth Circuit opinion engaged in layers of conjecture to justify its logic,[4] and the lower court now refuses to apply the correct *Ashe-Yeager* test to Shelby's case, this Court should grant the Petition. The only question remaining in this case is whether the Fifth Circuit's application of the *Ashe* standard was infected by an improper standard the first time. The lower court still has not considered the merits of Shelby's motion to dismiss on Double Jeopardy issue preclusion grounds with the correct standard. All that is needed for this Court to do is issue a summary grant, vacate, and remand for a decision with the correct standard as applied by the recent D.C. Circuit decision in *Coughlin*. 610 F.3d 89.

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[4] To reach its conclusion that issue preclusion would not apply to Shelby's case, the Fifth Circuit had to surmise that: the jury must have differentiated between the two sets of trades, making the timing distinction "on its own," to conclude that Shelby must have "used" the inside information in the summer but not the spring. 521 F.3d at 372-73, 373 n.11. Further, the court presumed that the jury acquitted the summer counts because Shelby sold shortly after his options vested, even though the court couldn't tell when the stock sold in July vested. *Id.*, at 372 n.9. None of these arguments were made to the jury. (But the record does show that the stock sold in July had vested the previous year.)

B. Under the *Ashe-Yeager* Test, the Jury Necessarily Decided There Was No Scheme at All.

Given the Fifth Circuit's stubborn adherence to its prior flawed application of *Ashe* and refusal to acknowledge that *Yeager* changed its prior formulation, the question remains what did the jury decide when it acquitted:

- Rex Shelby of his four summer 2000 insider trading counts;
- Joe Hirko of two spring 2000 insider trading and twelve spring-to-fall 2000 money laundering counts; and
- Scott Yeager of his conspiracy, January 2000 securities fraud, and four winter-to-spring 2000 wire fraud counts.

All three defendants presented the same defense: there was no scheme, the technology worked, and the public was not misled about the state of the technology. Given this spread of the twenty-four acquittals, logically, how could the jury have believed there was any scheme at all? By this partial verdict of multiple acquittals and given the points in controversy at trial, the jury's answer was simple: the defendants did not do it.

II. The Government's Broad Definition of "Colorable" Mis-reads *Richardson* and Goaded the Fifth Circuit Into a Split with Other Circuits in Disregard of This Court's Prior Decisions.

The Fifth Circuit ignores this Court's decisions in *Abney*, *Behrens*, and *Arthur Andersen*, using a

misreading of a few sentences of *dicta* in *Richardson* to overcome that line of cases' holding that appealability under the *Cohen* doctrine is determined by the category of order appealed, not by the merits of the individual case.[5] *Yeager* rejected the Government's argument that *Richardson* stood for the proposition that it may always retry hung counts from a partial verdict. 129 S. Ct. at 2369-70. Rather, *Richardson* resolved a double jeopardy (but not an issue preclusion) challenge to retrial based on insufficient evidence underlying the hung count where the jury acquitted on one count. *Id.* The Government again asserts a misreading of *Richardson* to subvert the *Cohen* doctrine and thwart this Court's line of cases restraining the *Cohen* analysis to categories of orders. Because the Fifth Circuit has adopted the Government's position, this Court should grant Shelby's Petition.

The Fifth Circuit and the Government require a showing on the merits before a defendant can have the opportunity to be reviewed on the merits.[6] This illogic highlights the intense error of the dismissal below and the warping of the meaning of "colorable."

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[5] *See Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896 (2009); *Behrens v. Pelletier*, 516 U.S. 299 (1996); *Abney v. United States*, 431 U.S. 651 (1977).

[6] Although the Fifth Circuit's logic is somewhat inscrutable, the court appears to believe that, as in *Richardson*, *see* 468 U.S. at 324 n.6, once it declares a case a loss on the merits, it can then declare a lack of jurisdiction. But *Richardson* only did so for future insufficient evidence cases, and did not declare a lack of jurisdiction over the case before it.

The ambiguity of the "colorable" inquiry has vexed the lower courts with definitions that vary from "possible," "not wholly insubstantial, immaterial, or frivolous," "seemingly valid," to "meritorious." *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1240 (10th Cir. 2001). However, the merits should be irrelevant to the jurisdictional analysis; otherwise, the courts may find themselves unable to vindicate rights before they are lost. *Powell v. Ridge*, 247 F.3d 520, 527-30 (3d Cir. 2001) (Roth, J. concurring).

If the Government is successful in its equation of "colorable" with the ultimate merits of a case, then all issues subject to collateral review under the *Cohen* doctrine may be threatened by the decision below. *See Pierce*, 253 F.3d at 1241 (determining whether federal question jurisdiction is "colorable"). Or, if the Government's argument for a merits-based "colorable" determination only applies to double jeopardy orders, then we are back to Justice Holmes' point in *Oppenheimer* — it cannot be that the rights of a civil litigant are greater than those of a criminal defendant whose very freedom is threatened. *See Yeager*, 129 S. Ct. at 2367 n.4 (citing *United States v. Oppenheimer*, 242 U.S. 85, 87 (1916)). No matter how extraordinary or weak a given case may be, appellate jurisdiction cannot be merits based. *United States v. MacDonald*, 435 U.S. 850, 859 n.6 (1978) (citing *Carroll v. United States*, 354 U.S. 394, 405 (1957) ("Appeal rights cannot depend on the facts of a particular case.")).

Further, added to the constitutional concerns to protect Double Jeopardy rights is the enormous advantage of a government prosecutor who choses to

go repeatedly against an individual. *See Will v. Hallock*, 546 U.S. 345, 352-53, 354 n. (2006). Because the right Shelby seeks to vindicate is "too important to be denied review," *Cohen*, 337 U.S. at 546, this Court should grant review to enforce uniform application of the *Cohen* doctrine.

The Government's invocation of *United States v. McAleer*, 138 F.3d 852 (10th Cir. 1998), only strengthens Shelby's point that "colorable" as used by *MacDonald* and *Richardson* could only refer to whether a case fits into a category of appealable order, not whether the merits of a case itself are worthy. *McAleer*, like *Richardson*, did not concern issue preclusion at all, but instead was a double jeopardy challenge brought after the district court granted a motion for new trial. In *McAleer*, the Tenth Circuit held that an appeal seeking to block re-trial on insufficient evidence grounds does not implicate the Double Jeopardy Clause at all, thus was not a "colorable" double jeopardy claim and did not qualify for the *Cohen* doctrine at all. 138 F.3d at 857. The Government's reliance on *McAleer* underscores its and some courts' confusion about the meaning of "colorable."

"Colorable" properly applied asks only whether a challenged order is in an appealable category at all, that is, whether there is "some possible validity" to the claim no matter what the ultimate merits of the case. The Government claims Shelby ignores this statement requiring "some possible validity" in *Richardson*. Opp'n Br. at 16. To the contrary Shelby believes the statement supports his Petition, as "possible" means just that, and once an order is in a category of appealable orders, that appeal has some

"possible" validity. As used in *Richardson*, "colorable" is not a comment on the relative value of the merits of a case.

Finally, the Fifth Circuit implies that because Shelby has been denied a writ of certiorari once before, his otherwise appealable Double Jeopardy order is not subject to review for him and him alone. This reliance on this Court's denial of Shelby's prior Petition demonstrates that once every few decades is apparently not too often to remind the lower courts that a denial of cert means nothing. *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.). For that additional reason, this Court should grant Shelby's Petition.

In the prior trial, the Government lumped the three broadband technology defendants together, trying them on a simplified conspiracy theory of the case. The jury answered with not a single conviction and a partial verdict of acquittal. Now that its prior strategy failed miserably, the Government wishes for a second bite at the apple. The Double Jeopardy Clause prohibits a second bite when the jury has answered broad fact questions favorably for the defendants. This Court should grant Shelby's Petition for Writ of Certiorari to enforce its holding in *Yeager* for the proper application of the *Ashe* test and to prevent the further subversion of the *Cohen* doctrine.

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IN THE

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REX SHELBY,

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UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

J. CRAIG JETT
**Counsel of Record*
BURLESON, PATE & GIBSON
900 Jackson St., Suite 330
Dallas, Texas 75202
Telephone: (214) 871-7676
jcj@bp-g.com

JAMES HRYEKEWICZ
BLAIES & HIGHTOWER
777 Main St., Ste. 1900
Fort Worth, Texas 76102
Telephone: (817) 334-8293
jwh@bhilaw.com

WILLIAM REAGAN WYNN
Chair, Amicus Committee,
Texas Criminal Defense
Lawyers Assn.
505 Main Street, Ste. 220
Fort Worth, Texas 76102
Telephone: (817) 336-5600
rwynn@kearneywynn.com

WILLIAM S. HARRIS
President, Texas Criminal
Defense Lawyers Assn.
307 W. 7th St., Ste. 1905
Fort Worth, Texas 76201
Telephone: (817) 332-5575
wmsharris.law@sbcglobal.net

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AMICUS BRIEF IN SUPPORT OF PETITIONER IN *SHELBY V. UNITED STATES*

INTEREST OF THE *AMICUS CURIAE*[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas, non-profit corporation with a membership of more than 3000 attorneys practicing in and outside the State of Texas. TCDLA was organized thirty-nine years ago with the following purposes: (1) to protect and ensure by rule of law those individual rights guaranteed by the Texas and United States Constitutions in criminal cases, (2) to resist efforts to curtail such rights, (3) to encourage cooperation among lawyers engaged in the defense of persons accused of crimes through educational programs and other assistance, and (4) through such cooperation, education, and assistance to promote justice and the common good.

In regard to this case, TCDLA has concern about how the decision of the Court of Appeals affects the jurisprudence of the Nation. First, the Court of Appeals' opinion places a limitation on a defendant's right to not be subject to double jeopardy. Second, the Court of Appeals has not fully abided by this Court's holding in *Yeager v. United States*, 129 S. Ct.

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[1] Amicus TCDLA gave notice to counsel of record for all parties ten days prior to the due date for this brief. Counsel for Rex Shelby and for the United States have both consented to the filing of this brief. No party or counsel for a party authored any part of this brief, and no one other than TCLDA, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

2360 (2009), that no effect shall be given to hung counts when engaging in a double jeopardy analysis.

SUMMARY OF THE ARGUMENT

TCLDA agrees with Petitioner Shelby's contention that this Court's decision in *Yeager* affected material change in the double jeopardy standard applicable to claims involving multiple-count verdicts consisting entirely of acquittals and hung counts. TCLDA shares Shelby's view that the Fifth Circuit erred in refusing his attempt to have that standard applied in his case, in denying relief, and finding the appeal to be substantially frivolous. TCLDA agrees with Shelby that the standard applied in his earlier appeal was both wrong and material to the outcome. However, TCLDA is also concerned more broadly with the Fifth Circuit's attempt to impose new procedural barriers to the review of double jeopardy claims.

In rejecting Shelby's appeal of a denial of a double jeopardy motion, the Fifth Circuit ignored settled precedent of this Court regarding jurisdiction over appeals of collateral orders. Since *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), this Court has held that appellate jurisdiction over a defined set of collateral orders, including double jeopardy orders, depends on the class of the order appealed, not the merits of the claim. *Arthur Andersen, LLP v. Carlisle*, 129 S. Ct. 1896, 1900-01 (2009); *Behrens v. Pelletier*, 516 U.S. 299, 311 (1996); *Abney v. United States*, 431 U.S. 651, 662 (1977). Indeed, even in a case of successive appeals of the same claim, this Court has rejected the attempt by lower courts to control "abuse" or frivolous claims through jurisdictional rulings. *Behrens*, 516 U.S. at

310-11; *see also Arthur Andersen*, 129 S. Ct. at 1901. This is so for the obvious reason that review of the issue after trial makes effective relief impossible. *Abney*, 431 U.S. at 659-61. The Fifth Amendment Double Jeopardy Clause protects against successive trials, not just multiple sentences. *Id.*, at 660-61.

The Fifth Circuit, in finding lack of subject-matter jurisdiction to review a final order on the grounds the claim is not "colorable," has "conflated the jurisdictional question with the merits of the appeal," *Arthur Andersen*, 129 S. Ct. at 1900, in precisely the manner this Court has refused to countenance. *See id.*; *Behrens*, 516 U.S. at 310. While the Fifth Circuit's Enron fatigue may or may not be understandable, this Court cannot let this jurisdictional error stand. The lower court's new jurisdictional hurdle upsets decades of this Court's jurisprudence related to the finality of orders under 28 U.S.C. § 1291. Refusal to accept jurisdiction over the claim essentially renders the claim "non-final," and insulates it from review until after trial, in direct contravention of *Abney*.

Moreover, the decision, although not limited to double jeopardy appeals, will have particularly grave consequences for that class of defendants. Double jeopardy appeals are brought by defendants who have already been tried on, and acquitted of, some counts. Rather than have their claim thoroughly and expeditiously reviewed under the standard set forth in *Ashe v. Swenson*, 397 U.S. 436 (1970), these defendants will be forced preliminarily to defend, without benefit of the record or briefing, the "colorable" nature of their claim. This burden is imposed even where, as here, the district court found

that the double jeopardy claim was not frivolous. *See* Pet. App. at 18a. The Court should grant the petition to preserve the right of defendants pleading double jeopardy to have their cases reviewed on the merits before they are required to "run the gauntlet of trial" a second time.

The Fifth Circuit's jurisdictional ruling is wrong on its face. Moreover, the ruling is premised on its erroneous contention that this Court's decision in the case of Scott Yeager, Rex Shelby's co-defendant, did not change the law applicable to Shelby's double jeopardy claim. *United States v. Shelby*, 604 F.3d 881, 887 (5th Cir. 2010), Pet. App. at 14a; *Yeager*, 129 S. Ct. 2360. In so finding, the Court of Appeals has erroneously read *Yeager* in a way that ignores both the explicit holding and rationale of that decision. In distinguishing *Shelby*, the lower court found that *Yeager* "stands for the proposition that if an acquittal establishes that the jury necessarily determined a certain element of the offense, the court may not examine the effect of hung counts to undermine that determination by showing that the jury was necessarily inconsistent or confused." *Shelby*, 604 F.3d at 887, Pet. App. 15a. That is the essence of the *Yeager* holding. However, the Fifth Circuit continues to believe that hung counts can be used to analyze whether the jury necessarily determined a fact in the first place. That is the issue in this case. And, unlike the narrower *Yeager* situation, it is or will be the case of the vast majority of defendants put in the position of double jeopardy. Courts, if allowed to speculatively compare why a jury acquitted on some counts and hung on others, will be able to create some

theory in every case to foreclose double jeopardy protections.

The holding and rationale of *Yeager* do not support the Fifth Circuit's reading. *Yeager*, 129 S. Ct. at 2368 ("we hold that the consideration of hung counts has no place in the issue-preclusion analysis"). Both require the elimination from the double jeopardy calculus of any and all speculation about hung counts from the determination of the facts the jury necessarily decided on the acquitted counts. Under *Yeager*, the failure of the jury to decide is a meaningless "non-event." Unanswered counts cannot be used, even comparatively, as a basis to speculate about what the jury did determine in deciding to acquit. The Fifth Circuit's continued reliance on the hung counts, whether for its own inferences or those it imputes to the jury, deny Shelby and any similarly-situated defendants their right under *Yeager* to the full benefit of what the jury indisputably did decide.

The test that *Yeager* requires is simple: the Court should consider the trial record as if the hung counts had not been brought at all. The question to be answered is whether, had the government not charged the hung counts, could it now charge them in a seriatim prosecution? TCDLA agrees with petitioner that the result of such analysis in this case would be to bar the earlier counts. We urge the Court to grant certiorari and direct the Fifth Circuit to apply this test, requiring the elimination of any and all consideration of hung counts, to this and future cases.

ARGUMENT

I. The Fifth Circuit's Jurisdictional Ruling Upsets Important and Settled Law on the Appeal of Collateral Orders and Should be Reversed.

Regardless of the underlying merits of Shelby's double jeopardy claim, the Fifth Circuit's refusal to accept jurisdiction and decide the case on the merits must be corrected. The decision flies in the face of settled law and analysis regarding jurisdiction over interlocutory appeals, including over successive appeals on the same issue.

Without belaboring the point, this Court's precedents make abundantly clear that even ostensibly frivolous appeals do not divest the appellate court of otherwise proper subject matter jurisdiction. *Arthur Andersen*, 129 S. Ct. 1900-01. Jurisdiction "'must be determined by focusing on the category of the order appealed from, rather than upon the strength of the grounds for reversing the order.'" *Id.* at 1900 (quoting *Behrens*, 516 U.S. at 311). A decision on double jeopardy is unquestionably a "final order," subject to interlocutory review. *Abney*, 431 U.S. at 662.

Even in instances of successive appeals, the Court has found that the only proper inquiry is the finality of the order, not the merits of the appeal. *Behrens*, 516 U.S. at 308-09; *cf. Mitchell v. Forsyth*, 472 U.S. 511, 515-19 (1985) (assigning no significance to successive aspect of second immunity claim). *Behrens* involved successive appeals of the denial of qualified immunity. In *Behrens*, the court of appeals affirmed the district court's denial of defendant's

claim of qualified immunity in a motion to dismiss. In *dicta*, the court of appeals then stated that "'[o]ne such interlocutory appeal is all that a government official is entitled to and all that we will entertain.'" *Id.*, at 304 (quoting *Pelletier v. Federal Home Loan Bank of San Francisco*, 968 F.2d 865, 870-71 (9th Cir. 1992)). After his summary judgment motion was denied on the same issue, Behrens appealed. The district court certified the appeal as frivolous and the court of appeals, in an unpublished order, summarily dismissed the appeal for lack of jurisdiction.

This Court reversed, holding that the proper analysis remains that of the Court's "finality jurisprudence" under *Cohen*, 337 U.S. 541, and not whether the appeal is frivolous, superfluous, or otherwise unnecessary. *Behrens*, 516 U.S. at 308-09. The Court specifically rejected the dissent's argument that the second appeal "does not come within *Cohen*'s class of immediately appealable final orders because it is insufficiently 'separable' from the claim raised on the first appeal." *Id.* at 309, n.3. The Court reasoned that, under *Cohen*, the question to be resolved is whether the appeal is "separable" from the merits of the plaintiff's claims, not, as the dissent would have it, whether the second appeal is "separable" from the first. *Id.*

Under these precedents, the order from which Shelby appeals is clearly a final interlocutory order under 28 U.S.C. § 1291. Indeed, the district court here, unlike in *Behrens*, did not even find the appeal to be frivolous and affirmatively held otherwise. Pet. App. at 18a. But, strikingly, the Fifth Circuit does not cite *Cohen* or *Behrens*. And the Court cites *Abney* only for the proposition that the court may establish

summary procedures to control frivolous appeals. 604 F.3d at 884, 885; Pet. App. at 9a, 10a. *Abney* specifically rejected conditioning jurisdiction on the merits of the claim; *Abney*'s point is that frivolous claims are better controlled through the court's supervisory powers. *Abney*, 431 U.S. at 663. The Fifth Circuit's decision to use jurisdiction to control potential abuse is precisely the same rationale that has been consistently rejected by this Court. *See Abney*, *Behrens*, and *Arthur Andersen*.

The Fifth Circuit's reliance on the *dicta* of *Richardson v. United States*, 468 U.S. 317 (1984) is misplaced. TCDLA adopts the arguments of Petitioner Shelby in this regard and does not repeat them here.

The effects of allowing this case to stand are clear. Apart from vitiating this Court's finality jurisprudence under *Cohen*, all defendants claiming double jeopardy may now be faced with a motion to dismiss, forcing them to defend the "colorable" merits of their claim without benefit of briefing or the record — even where the district court most familiar with the case has found the issue to be worthy of immediate review and a stay of trial proceedings. This is the very opposite of the careful, thorough *Ashe/Yeager* analysis of the record that this Court has mandated, and abrogates *Abney*'s requirement that the defendant obtain final review before undergoing a second trial. This Court should grant the petition for certiorari and reverse.

II. This Court Should Correct the Fifth Circuit's *Yeager* Analysis, or, in the Alternative, Reverse Under This Court's Supervisory Power.

This Court's holding in *Yeager*, according to the Fifth Circuit, "stands for the proposition that if an acquittal establishes that the jury necessarily determined a certain element of the offense, the court may not examine the effect of hung counts to undermine that determination by showing that the jury was necessarily inconsistent or confused in its conclusions." 604 F.3d at 887; Pet. App. at 15a. However, the Fifth Circuit went on to say that "[n]othing in *Yeager []* prohibits the type of comparison drawn in this case, in which the distinction was cited simply to demonstrate one possible rational basis for the jury's acquittal." *Id.* Thus, the Fifth Circuit and the district court did exactly what *Yeager* said not to do, that is, consider the hung counts to determine, in the first place, what the jury necessarily determined. *Id.*; Pet. App. at 23a-24a. The Fifth Circuit rejected petitioner's claim that this use of the hung counts violated *Yeager*. *Shelby*, *supra* at 887; Pet. App. at 14a-15a.

The Fifth Circuit's erroneous reading may be premised on a distinction not cognizable under the holding and rationale of *Yeager*. In *Yeager*, this Court's "grant of certiorari was based on the assumption that the Court of Appeal's interpretation of the record was correct", after noting that the district court and the Court of Appeals disagreed as to what the jury necessarily decided in its acquittals. *Yeager*, 129 S. Ct. at 2364-65, 2370. This Court said that the Court of Appeals could revisit its factual

analysis in light of the government's arguments before this Court. *Id.*, at 2370. The Court further accepted the lower court's finding that these facts were logically inconsistent with the jury's non-decision in the hung counts. *Id.*, at 2365. The Court then rejected the Fifth Circuit's use of the hung counts to escape the collateral estoppel effect of the actual findings relating to the acquittals. *Id.*, at 2368. Because *Yeager* did not address *how* the Fifth Circuit determined the facts necessary to the acquittal, the case did not squarely present the issue raised here — and therefore, according to the Fifth Circuit did not change the intervening law applicable to Shelby.

The holding in *Yeager* is not so limited: "we hold that the consideration of hung counts has no place in the issue-preclusion analysis." *Id.*, at 2368. "No place" is unequivocal, and would appear to encompass even the "comparative" use of the hung counts sanctioned by the Fifth Circuit. Moreover, this Court addressed, in detail, why hung counts are not considered a relevant part of the proceedings for purposes of the *Ashe* inquiry. *Id.*, at 2367-68. As this Court explained, hung counts do not make the "'existence of any fact . . . more probable or less probable'" and drawing any inferences or conclusions from them "is not reasoned analysis; it is guesswork." *Id.*, at 2368 (quoting in part FED. R. EVID. 401). Further, such an inquiry would require impermissible "speculation into what transpired in the jury room." *Id.* This reasoning applies perhaps even more strongly to the inquiry regarding the issue of determining what the jury necessarily decided in the first place.

Under the test TCDLA believes *Yeager* mandates and that we urge this Court to explicitly enforce, courts must consider whether, had the hung counts never been charged, a seriatim prosecution could be brought after the acquittals. Applying that test to the facts of this case demonstrates its merits.

Rex Shelby was tried and acquitted of four counts of insider trading based on trades in Enron stock that occurred on June 26, 27, 28 and July 19, 2000. The counts were based on an alleged scheme, that took place "from at least April 1999 until May 14, 2001," to engage in conduct and make "false and misleading statements and omit[] material information from statements made, all of which were designed to and did deceive the public and others about the technological capabilities, value, revenue and business performance of" Enron Broadband Services, Shelby's employer. *See* Fifth Superceding Indictment at ¶ 11. The specific counts of which he was acquitted re-alleged the scheme and further charged that Shelby, "while in possession of material non public information regarding the technological capabilities, value, revenue and business performance" of Enron sold the shares of Enron stock. *Id.* at ¶ 50.

Considering only those counts, and the record at trial relevant to them under *Ashe*, a rational court would conclude that the indictment, and the government at trial, charged that there was one simple scheme to defraud, running for over two years, and involving the continual touting of the "technological capabilities, value, revenue and business performance" of Enron Broadband Services. During the period of the alleged scheme, Shelby sold stock

repeatedly, without disclosing the non-public material information that the "technological capabilities, value, revenue and business performance" of the company was a sham. A rational court would conclude, as there was no contention to the contrary, that the non-public information that Shelby allegedly knew remained in essence the same throughout the period of the scheme. No evidence was presented, nor did either party contend, that any disclosures were made during the time of the scheme that changed the non-public nature of the information. There was no evidence or argument that the state of Shelby's knowledge changed.

The essence of insider trading is the rule of "abstain or disclose." It is undisputed that Shelby did not abstain from trading. It is also undisputed that he did not disclose. Ergo, to acquit, the jury must have determined that Shelby did not have non-public material information, either because he was not part of the scheme, or because the scheme itself did not exist. Under this record, barring any new facts regarding a different scheme or intervening disclosures, it is virtually certain that a seriatim prosecution based on Shelby's January 21, February 1, and March 22, 2000, trades (or, for that matter, any of his other trades during the scheme) would be prohibited under *Ashe*.

Comparing the above to the Fifth Circuit's analysis aptly proves that the use of hung counts, at whatever stage of analysis, leads to just the type of speculation that *Yeager* sought to prevent. Rather than exclude all evidence of the hung counts, the Fifth Circuit began its analysis with the comparison between the hung and acquitted counts. *See Yeager*

v. United States, 521 F.3d 367, 373 (5th Cir. 2008) ("In acquitting . . . , the jury could have differentiated between the two different sets of trades"). Then, attempting to reconcile the acquittals with the hung counts, the Fifth Circuit fixates on an obscure element of insider trading not even alleged in the indictment or in controversy at trial: whether the insider information was "used" or "a factor" in Shelby's trades. *Id.* at 373-74; *see* Fifth Superceding Indictment at ¶¶ 11, 50. That focus comes *because of, not in spite of,* the court's consideration of the hung counts.

Similarly, the lower court's conclusion that the government introduced more evidence of Shelby's knowledge of the fraud in January through March than later in the summer months is simply not relevant (and is irrational) unless one is attempting to distinguish the hung counts. *See Shelby*, 604 F.3d at 886. Moreover, the absurdity of this "distinction" is evident if one turns it around; surely the government would not concede that it was required to prove, by introducing contemporaneous evidence, that Shelby still knew in June what he had known in March —indeed the allegation at trial was that he knew *more* as time went on.

Because the "timing" theory has been spun from its attempt to differentiate the counts, and not from the evidence at trial, the Fifth Circuit is forced to conclude that the "timing distinction is . . . one that the jury could have made on its own." *Yeager*, 521 F.3d at 373, n.11. But this is exactly the kind of speculation regarding jury deliberations that this Court's decision in *Yeager* sought to foreclose. In any event, as that opinion points out, the jury, in

hanging, did not make any such distinction; it made no finding at all. *Yeager* 129 S. Ct at 2367-68. Rather, the distinction here has been made by the Fifth Circuit, and then only because it looked first for a reason to distinguish the hung counts from the acquittals.

To paraphrase an old saying, once the skunk of hung counts was thrown into the Circuit conference room, it was tough for this Court to instruct it to ignore the stench. Thus, after this Court's decision in *Yeager*, the lower court refused to reengage in the *Ashe* analysis in a way that would eliminate all consideration of the hung counts from its analysis. But we believe that, *without reference to the hung counts*, it strains credibility, and insider trading law, to argue that the jury found that Shelby knew that the company was a fraud, and the stock would be virtually worthless if that fraud were exposed, but that the information was not "used" or "a factor" in his decision to trade in the summer of 2000. If the defense had made such an argument in trial, the government would have ridiculed it to great effect with the jury. The government would have argued that it defied "common sense" for Shelby to contend that in the summer of 2000 he did not act on the inside information he had acquired when he sold the stock and made millions of dollars, even though he had all of this insider information when he made the early 2000 trades. How could he "use" the insider information in early 2000, but not in the summer of 2000? Because he logically could not (and no such argument was made on this trial record) the government must be precluded from retrying him on his remaining counts.

This Court should grant certiorari to make clear that, in applying *Ashe*, courts must completely exclude consideration of the hung counts at every stage of the analysis, including in determining what the jury necessarily decided in its acquittals. The vast majority of defendants alleging double jeopardy will find themselves in a situation like Shelby, rather than Yeager. This is because, if *Shelby* is left to stand, it will be a rare court that, in comparing hung counts and acquittals, cannot come up with some distinguishing circumstance that would explain the jury's action, especially when allowed to speculate outside the theory of the case and the points in controversy at trial, and base its decision on what the jury could have decided "on its own."

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari, vacate the judgment below, and remand with instructions to reconsider in light of this Court's holding in *Yeager*.

Respectfully submitted,

J. CRAIG JETT
**Counsel of Record*
BURLESON, PATE & GIBSON
900 Jackson St., Suite 330
Dallas, Texas 75202
Telephone: (214) 871-7676
jcj@bp-g.com

JAMES HRYEKEWICZ
BLAIES & HIGHTOWER
777 Main St., Ste. 1900
Fort Worth, Texas 76102
Telephone: (817) 334-8293
jwh@bhilaw.com

WILLIAM REAGAN WYNN
Chair, Amicus Committee,
Texas Criminal Defense
Lawyers Assn.
505 Main Street, Ste. 220
Fort Worth, Texas 76102
Telephone: (817) 336-5600
rwynn@kearneywynn.com

WILLIAM S. HARRIS
President, Texas Criminal
Defense Lawyers Assn.
307 W. 7th St., Ste. 1905
Fort Worth, Texas 76201
Telephone: (817) 332-5575
wmsharris.law@sbcglobal.net

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